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No. 90 -

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT GIGANTE,
Petitioner,

v.

RUNSHIP, LTD., and
LAURITZEN REEFERS, A/S,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Charles Sovel, Esq.
Freedman and Lorry, P.C.
800 Lafayette Building
5th and Chestnut Streets
Philadelphia, PA 19106
(215) 925-8400
Attorneys for Petitioner

QUESTION PRESENTED

1. In an action for damages under Section 5(b) of the Longshore and Harbor Workers' Compensation Act, may a longshoreman injured while unloading cargo from a vessel maintain an action for negligence against the vessel for injuries caused by the defective stowage of the cargo by an independent stevedore in a foreign loading port where the evidence establishes that the vessel had knowledge of the defective manner in which the cargo was stowed?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Robert Gigante, respectfully prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered May 8, 1990, affirming the granting of Summary Judgment in favor of respondents in the within proceeding, and the

Order of the United States Court of Appeals for the Third Circuit entered June 5, 1990, denying petitioner's Petition for Rehearing, and in support thereof represents as follows:

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals affirming the decision of the district court is not yet officially reported, and is reproduced in the appendix hereto at page 14a.

The Order of the United States Court of Appeals for the Third Circuit denying petitioner's Petition for Rehearing is not yet officially reported, and is reproduced in the appendix hereto at page 16a.

The Opinion of the United States District Court for the District of New Jersey is not officially reported, and is reproduced in the appendix hereto at page 1a.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on May 8, 1990 (14a). The Order of the United States Court of Appeals for the Third Circuit denying the Petition for Rehearing was entered June 5, 1990 (16a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).[1]

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1. Two other parties, United Trading Company S.A. and Transreefer originally were named as defendants in the action. However, they were never served and the action was dismissed as to them in the district court prior to the filing of the Notice of Appeal. Neither United Trading Company S.A. nor Transreefer were parties in the Court of Appeals.

STATUTE INVOLVED

Section 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b).

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided by this subsection shall be exclusive of all other remedies against the vessel except remedies avail able under this chapter.

LEGISLATIVE HISTORY INVOLVED

The legislative history of the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act appears in House Report No. 92-1441, and is reprinted in 1972 U.S. Code Cong. & Adm. News, Vol. 3, beginning at page 4698. The portion relating to the elimination of the unseaworthiness remedy begins a page 4701 and is reproduced in the appendix hereto beginning at page 18a.

STATEMENT OF THE CASE

Petitioner, Robert Gigante, was injured while working as a longshoreman and engaged in discharging a cargo of palletized units of cartons of apples from the No. 2 hold of the M/V MALAYAN REEFER, a cargo ship which was owned by respondent, Runship, Ltd. and operated by respondent, Lauritzen Reefer, A/S (1a). Petitioner was injured when a unit of the palletized cartons of apples broke apart as it was being lifted from the hold, causing several cartons of the apples to fall back down into the hold and strike petitioner.[2] At the time of the accident, petitioner was working in an area of the cargo stow referred to as the "key." Because this "key" area was too small -- only 13 feet by 13 feet (2a) -- petitioner was unable to step back from under the pallets to a position of safety as the units were being lifted from the hold, and, therefore, was unable to avoid being hit by the falling cartons. In bringing the instant action, petitioner contended that respondents, as the owner and operator of the vessel, respectively, were negligent in providing a cargo stow in which the "key" was too small to permit the longshoreman to work safely, and therefore were negligent in providing a cargo stow which was unsafe and unreasonably dangerous (2a).

In the district court, respondents moved for summary judgment, relying on the Third Circuit's decision *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987). The district court granted this motion, holding that, under *Derr*, a shipowner's observation of an unsafe condition existing in a cargo stow could not be a basis for imposing liability on a shipowner under Section 5(b) of the Longshore and Harbor

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2. The apples were packed in cardboard cartons which were strapped onto wood pallets. The pallets measured 4 feet, 2 inches long, by 3 feet, 4 inches wide, and the cartons were stacked on the pallets to a height of approximately 6½ feet (See Appendix in Court of Appeals, pages 65A-67A). Each pallet with the cartons of apples strapped on it is referred to as a "unit."

Workers' Compensation Act (5a, 11a). The factual background with respect to the manner in which petitioner was injured, the creation of the "key", the vessel's knowledge of the size of the key, and the vessel's knowledge of the manner in which the longshoremen were discharging the cargo, as set forth in the record before the district court on the motion for summary judgment, disclosed the following:

The procedure utilized by the discharging stevedore to discharge the palletized units of apples involved the use of a device known as a chandelier spreader which had forks on it similar to the forks on a forklift truck which could be inserted into the pallets and used to lift the pallets from the hold. However, before the chandelier spreader could be utilized, it was necessary to clear sufficient space in the cargo stow to allow for its use. This would be accomplished by having a certain number of the units of apples "pre-slung", *i.e.*, -- wrapped with nylon cords which could be attached to the ship's cargo hook and lifted from the hold to create an opening in the cargo stow. The opening in the stow thus created was referred to as the "key" (1a-2a, see Appendix in Court of Appeals, pages 50A, 63A).

The "key" would be created by the loading stevedore in the foreign port (in this case Chili) who, in the course of loading the units, would determine which units would be "pre-slung." The size and location of the "key" thus was determined *prior* to the start of cargo operations in the discharging port and was a condition existing at the start of cargo operations in the discharging port.

There was evidence in the record that the foreign stevedore was instructed by respondent, Lauritzen Reefers, A/S to create a key which would be large enough to allow the use of the chandelier spreader, but not larger than that (see Appendix in Court of Appeals, pages 122A-124A), and there also was evidence, that the vessel had *actual knowledge* of the size of the keys that were being created. This included evidence that respondents had a port captain representing them in the loading port when the cargo was loaded

(see Appendix in Court of Appeals, page 86A), that the vessel was provided with a copy of the loading stowage plan which showed the location and size of the keys in the stow (see Appendix in Court of Appeals, page 125A), that the Captain of the vessel signed a certification that the "stowage, shoring, lashing and flooring" of the stow was done to his "entire satisfaction" (see Appendix in Court of Appeals, page 126A), and that respondents had a port captain present during the discharging operation who also was aware of the location and size of the keys prior to the start of cargo discharging operations (see Appendix in Court of Appeals, page 98a).[3]

At the time petitioner was injured, he was working in the C deck of the ship's No. 2 hold. After opening this cargo compartment, the longshoremen first removed the pre-slung units. The removal of these pre-slung units resulted in a key which was approximately 13 feet by 13 feet in size (1a-2a). At that point a two unit chandelier spreader was attached to the ship's cargo hook which the longshoremen then began using to discharge the other units which were in the hold. Petitioner, along with another longshoreman, was assigned to work in the key positioning the prongs of the chandelier spreader in the pallets of fruit (2a). The first draft of two palletized units was lifted from the hold without incident.[4] However, as the second draft of two palletized units was being lifted from the hold, one of the wood pallets broke apart, and the cartons of apples which

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3. In his brief in the Court of Appeals, counsel for respondents stated that respondents did "not deny they had actual knowledge of the size of the "key" in the "C" deck, No. 2 hatch" (Respondents' Brief in Court of Appeals at page 27).

4. The longshoremen use the term "draft" to refer to whatever is being lifted from the hold at any one time by the cargo gear. In the instant case, since the longshoremen were using a two unit chandelier spreader, the term "draft" refers to the two palletized units being lifted from the hold at any one time by the spreader.

were on it fell back down into the hold and several of them struck and injured petitioner. Because of the confined area of the key, petitioner could not avoid being under the draft of two palletized units as it was being lifted from the hold and could not avoid being hit by the falling cartons (2a).

In opposing the motion for summary judgment, petitioner submitted evidence, in the form of an affidavit from an expert in maritime cargo operations, that the key which was provided respondents was too small, and that it should have been large enough to permit the longshoremen working in it to be able to step back to a position where they would be at least 12 to 15 feet away from being under the units as they were being lifted from the hold (see Appendix in Court of Appeals, pages 130A-132A).

Notwithstanding this evidence, the district court, citing the decision in *Derr, supra*, held that the observation of the size of the key by the vessel's representatives did not give rise to a duty on the part of the shipowner to "supervise or inspect" the manner in which the cargo was stowed (7a), and that the vessel's duty to intervene in cargo operations, even where the vessel had actual knowledge of an unsafe condition, related only to unsafe conditions involving the ship and its equipment, and did not extend to unsafe conditions existing in a cargo stow (9a-11a).[5]

On appeal, the Third Circuit affirmed by Judgment Order, simply citing the decision in *Derr, supra*, as authority (14a-15a). Thereafter, a Petition for Rehearing was filed

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5. The district court also held that respondents had not breached any duty to warn of the unsafe condition created by the limited size of the key because this was a condition which was "open and obvious" (8a, 11a). However, this holding was superfluous as petitioner was not asserting a breach of any duty to warn as a basis for liability. Rather, liability was predicated on the existence of a hazardous condition which respondents had reason to know would not be remedied by petitioner's stevedore employer, *cf. Callen v. Oulu, O/Y,* 711 F.Supp. 244 (E.D. Pa. 1989), *aff'd.*, 897 F.2d 520 (1990).

requesting *in banc* consideration of the decision in *Derr*, as no Petition for Rehearing In Banc had been filed following the original *Derr* decision. This Petition for Rehearing was denied; however, three Judges of the Court, Judges Becker, Scirica and Cowen, stated that they would grant rehearing *in banc* (16a-17a). Judge Becker, who was a member of the panel which initially affirmed the district court decision, specifically stated that he "would grant rehearing so that the court *in banc* might reconsider" the decision in *Derr* (17a).

REASONS WHY THE WRIT SHOULD BE GRANTED

1. **The decision below, which is based on the decision in *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988), is in direct conflict with the decisions of the Court of Appeals for the Fifth Circuit, in *Woods v. Sammisa Co., Ltd. and Sammiline Co., Ltd., et al*, 873 F.2d 842 (5th Cir.), *petition for rehearing and for rehearing in banc denied*, 878 F.2d 1435 (5th Cir. 1989), *cert. denied*, 107 L.Ed.2d 847 (1990), *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), and *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), on the important and recurring issue of the vessel's liability for unsafe conditions caused by the defective stowage of cargo by an independent stevedore.**

In *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988), the Third Circuit held that a shipowner had no duty to inspect or supervise the manner in which cargo was stowed by a foreign stevedore, and, therefore, could not be held liable to a longshoreman who suffered injury as a consequence of the negligent and defective manner in which cargo may have been stowed by a foreign stevedore, see *Derr*, 835 F.2d at

495 (62a).[6] In the two cases that were before the Third Circuit in *Derr* there were factual issues as to whether the vessel had actual knowledge of the claimed hazardous conditions in the cargo stow, *i.e.*, -- cargo that was not adequately lashed and secured in the cargo stow. In the instant case, however, there was ample evidence of the shipowner's knowledge of the size of the key, and counsel for the shipowner has admitted such knowledge.[7] Since the Third Circuit affirmed the granting of summary judgment in the instant case solely on the authority of *Derr*, it is clear that the Third Circuit's view of the law is that such knowledge is irrelevant and that a shipowner is not liable for a negligent condition existing in a cargo stow *even if* the evidence establishes that the shipowner had actual knowledge of the condition.

The views of the Third Circuit, as illustrated by its decisions in *Derr* and the instant case, are in clear and unequivocal conflict with several decisions of the Fifth Circuit which, in similar factual situations, have held the shipowner liable for injuries caused to a longshoreman as a result of the negligent and defective manner in which cargo was stowed by a foreign stevedore. The most recent, and clearest, illustration of this conflict is the Fifth Circuit's decision in *Woods v. Sammisa Co., Ltd. and Sammiline Co., Ltd., et al*, 873 F.2d 842 (5th Cir.), *petition for rehearing and for rehearing in banc denied*, 878 F.2d 1435 (5th Cir. 1989), *cert. denied*, 107 L.Ed.2d 847 (1990) (25a).[8]

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6. The *Derr* decision is reproduced in the appendix hereto beginning at page 54a. In citing *Derr* in this petition we will cite both the official report of the *Derr* decision and the corresponding page in the appendix.

7. See footnote 3, *supra* page 6.

8. The decision in *Woods v. Sammisa Co., Ltd. et al*, is reproduced in the appendix hereto beginning at page 25a.

In *Woods*, as here, a longshoreman was discharging cargo that had been loaded in a foreign port by a foreign stevedore, and was injured because of the unsafe manner in which the cargo had been stowed. In *Woods* the longshoreman was injured when he fell into a gap in the cargo stow while running to avoid cargo (pipe) that began swinging as it was being lifted from the hold. The cause of the swinging of the pipe during the discharge operation originated in the unsafe manner in which the cargo had been loaded by the foreign stevedore. As in the instant case, the condition of the cargo stow which led to Woods' injury was known both to the vessel and to the discharging stevedore (Woods' employer).

At trial Woods contended, *inter alia*, that the vessel was negligent in failing to ensure that the loading stevedore in the foreign port stowed the cargo in such a manner that it could be discharged with reasonable safety (33a). Following a jury verdict in Woods' favor, the vessel (both owner and charterer) appealed. On appeal the vessel argued that the vessel's duty of reasonable care did not extend to the vessel's cargo, as distinguished from the vessel's gear and equipment, citing *Derr* as authority, 873 F.2d at 848 (32a). The Fifth Circuit rejected this argument and, in so doing, made it clear that it disagreed with the reasoning of the *Derr* decision. Instead, the Fifth Circuit stated that it would continue to follow its prior decisions in *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), and *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), which held that the vessel's duty of reasonable care encompassed hazardous conditions existing in a cargo stow as a result of faulty stowage by a loading stevedore. The Fifth Circuit stated, 873 F.2d at 848-849 (33a-34a):

> As in *Derr*, the essence of the Woodses' claim is that the defendants failed to exercise proper control over the stowage and discharge of the pipe cargo; the defendants thus urge us to follow *Derr*'s lead and hold that a vessel cannot be held liable for injuries resulting from the negligence of an independent stevedore.

Our court, however, has already visited this question and reached the opposite result. In *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. Sept. 1981), decided shortly after *Scindia*, a longshoreman injured during discharge operations sued the vessel owner under section 905(b), alleging that the owner was legally responsible for the negligent manner in which the cargo had been stowed and that such negligence was the cause of his injuries. An independent stevedore had loaded the cargo, and the plaintiff sought to hold the owner liable because the chief mate had actual knowledge that the stevedore was utilizing improper loading techniques. *Id.* at 116.

Although we noted the language in *Scindia* to the effect that the shipowner has no duty to supervise cargo operations or inspect the cargo, we extended *Scindia*'s imposition of a duty on the shipowner to correct, as to all dangerous conditions including those relating to cargo, equipment-related and other defects of which it has actual knowledge and which it actually knows the stevedore does not intend to correct. That duty extends to conditions that arise before or during stevedoring operations. In so holding in *Lemon*, we assumed that the shipowner has at least the power to control the actions of independent stevedores: We stated that this duty "furnishes an incentive to the shipowner to correct those dangerous conditions he recognizes in addition to those he actually creates." *Id.* at 115.

Without questioning our assumption that such power exists in theory and practice, we have continued to follow our holding in *Lemon*. *See Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 299 (5th Cir. 1984). Because we are bound by this court's prior decisions unless and until they are reconsidered en banc, we must decline to accept the defendants' argument that an owner/operator owes no duties to a stevedore and longshoreman with respect to cargo operations that are solely within the stevedore's control.

The foregoing excerpt from the *Woods* opinion serves to highlight the nature and extent of the continuing conflict between the Fifth Circuit and the Third Circuit with respect to the shipowner's responsibility for hazardous conditions arising from negligently stowed cargo. This conflict is significant because injuries to longshoreman due to improper stowage are a frequent and recurring event. The negative impact of the *Derr* decision on the right of longshoreman to recover damages for injuries resulting from improperly stowed cargo in the Third Circuit has been substantial. As an example, since *Derr* was decided, there have been at least five cases decided in the Eastern District of Pennsylvania in which summary judgment has been granted dismissing actions by longshoreman against vessels in which the granting of summary judgment was based wholly or substantially on the *Derr* decision. See *Whitfield v. Craigwin Co., Ltd,*, 727 F. Supp. 183 (E.D. Pa. 1989), *Thomas v. Kambara Kisen Co., Ltd.*, Civil Action No. 88-7243 (E.D. Pa. 1990), *Davis v. Kambara Kisen Co., Ltd.*, Civil Action No. 88-7245 (E.D. Pa. 1990), *Irby v. Tokai Lines*, Civil Action No. 88-6890 (E.D. Pa. 1990), *Brown v. Baltic Shipping Company*, Civil Action No. 87-1929 (E.D. Pa. 1988)(Bench Opinion). Had these actions been brought in the Fifth Circuit, it is reasonable to assume the summary judgment would not have been granted.

In the Legislative History which accompanied the 1972 amendments of Section 5(b) of the Longshore and Harbor Workers' Compensation Act, Congress specifically noted that it intended that the negligence remedy it was authorizing be uniformly applied in the various ports of the country (23a-24a). The presently existing conflict between the Third Circuit and the Fifth Circuit with respect to the vessel's responsibility for negligently stowed cargo has created a significant lack of uniformity which is ongoing in nature and which has had and will continue to have significant impact on longshoreman litigation and the implementation of the negligence remedy which Congress mandated. Accordingly, it is submitted that certiorari should be granted so that this conflict may be resolved.

2. The Third Circuit's holding that a vessel has no duty of care with respect to unsafe conditions in a cargo stow created by a loading stevedore is in conflict with this Court's decision in *Scindia Steam Navigation Co. v. De los Santos*, 451 US 156, 68 L Ed 2d 1 (1981), and contrary to the Congressional mandate, clearly set forth in the Legislative History, that the longshoreman's negligence remedy was to be similar to that available to persons engaged in shoreside, non-maritime employment.

In *Scindia Steam Navigation Co. v. De los Santos*, 451 US 156, 68 L Ed 2d 1 (1981), this Court set forth the basic principles governing a vessel's liability to longshoremen. Quoting *Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404, 22 L.Ed.2d 371 (1969), this Court stated, 451 U.S at 166-167:

> We held in Marine Terminals v. Burnside Shipping Co. 394 US 404, 415, 22 L Ed 2d 371, 89 S Ct 1144 (1969), that the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care "under the circumstances." This duty extends at least to exercising ordinary care under the circumstances *to have the ship and its equipment* in such condition that an expert and experienced stevedore will be able to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. Id., at 416, n 18, 22 L Ed 2d 371, 89 S Ct 1144. (Emphasis supplied)

Beginning with this statement of the vessel's duty, this Court, in *Scindia*, then discussed the relationship between

the vessel and the injured longshoreman's stevedore employer in the context of the vessel's right to rely on the stevedore employer to protect the longshoreman from injuries caused by conditions arising during the course of stevedoring operations, see 451 U.S. at 170, 68 L.Ed.2d at 14.

While neither *Scindia* nor *Burnside* involved hazardous conditions existing in a cargo stow, the Third Circuit, in *Derr*, and *a fortiorari*, in the instant case, proceeded to interpret *Scindia* as *limiting* the shipowner's duty to the vessel's gear and equipment and excluding hazardous conditions existing in a cargo stow, see *Derr*, 835 F.2d at 495-496 (62a-63a). In so holding the Third Circuit also held that the limited responsibility which *Scindia* held that the vessel had for conditions arising during the cargo operations being performed by the injured longshoreman's stevedore employer also extended to the cargo operations performed by a foreign loading stevedore, see *Derr*, 835 F.2d at 494-495 (59a-61a). Both these holdings in *Derr* are in error.

While there is language in the *Scindia* decision limiting the vessel's duty to inspect the work of the stevedore once cargo operations have begun, it is clear that the stevedore being referred to is the injured longshoreman's stevedore employer, -- not some other stevedore, such as a foreign loading stevedore, who has no responsibility for the longshoreman's safety. It is clear both from *Scindia* and from the Legislative History of Section 5(b) of the Longshore and Harbor Workers' Compensation Act that the limitation on the duty of the vessel to inspect and supervise the work of stevedores relates *solely* to the work of the injured longshoreman's stevedore employer, and *not* to work performed by a foreign stevedore in a foreign port long before the vessel arrives in the United States.

In this regard, one of the most telling parts of the Legislative History is the House Committee's description of those types of accidents for which a vessel would no longer be liable. In describing the type of claims which no longer

could be brought, the Legislative History carefully and specifically refers to unsafe conditions created by stevedores **subject to the Act**, *i.e*, -- American, not foreign, stevedores, -- and cites a series of cases involving unsafe conditions attributable in whole or in part to the negligence of the injured longshoreman's stevedore employer, and not to some other stevedore such as a loading stevedore in another port. Thus, the Legislative History states (21a):

> Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores **subject to this Act**, *Crumedy v. The J. H. Fisser*, 358 U.S. 423, *Albanese v. Matts*, 382 U.S. 283, *Skibinski v. Waterman SS Corp.*, 330 F.2d 539; for the manner or method in which stevedores or employees of stevedores **subject to this Act** perform their work, *A. N. G. Stevedores v. Ellerman Lines*, 369 U.S. 355, *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367; for gear or equipment of stevedores or employees of stevedores **subject to this Act** whether used aboard ship, or ashore, *Alaska SS Co. v. Peterson*, 347 U.S. 396, *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence. (Emphasis in bold supplied)

The repeated references in the Legislative History to stevedores "subject to this Act", coupled with the holdings of the cases cited, cannot be ignored or viewed as accidental. If Congress had intended to free vessels from the obligation to inspect for and remedy unsafe conditions created by *all* stevedores, including a foreign stevedore in a loading port, it simply could have eliminated the phrase "subject to

this Act" from the description of the type of cases that were being eliminated. The fact that this phrase was not eliminated, but rather was repeated three times, is a clear manifestation that Congress did not so intend.

Throughout the Legislative History accompanying the 1972 amendments to Section 5(b) of the Longshore and Harbor Workers' Compensation Act there are repeated references to the intention of Congress that a longshoreman should have a negligence remedy similar to that available to persons engaged in shoreside, non-maritime employment. Thus the following excerpts appear in the Legislative History:

> . . . . The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, **just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.** (8a) (Emphasis in bold supplied)
>
> * * *
>
> Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. **This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.** (20a-21a) (Emphasis in bold supplied)
>
> * * *
>
> . . . The Committee intends that on the one hand an employee injured on board a vessel **shall be in no less**

favorable position *vis a vis* his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner **such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.** (22a) (Emphasis in bold supplied)

Under basic and well established principles of land side law, the employer of an independent contractor has the duty to inspect the work of that contractor once the contractor has *finished* its work and is liable for any unsafe conditions which such an inspection would disclose. The applicable principle is set forth in § 412 of the Restatement of Torts, 2d, as follows:

§ 412. Failure to Inspect Work of Contractor after Completion.

One who is under a duty to exercise reasonable care to maintain land or chattels in such condition as not to involve unreasonable risk of bodily harm to others and who entrusts the work of repair an maintenance to an independent contractor, is subject to liability for bodily harm caused by them by his failure to exercise such care as the circumstances may reasonably require him to exercise **to ascertain** whether the land or chattel is in reasonably safe condition **after the contractor's work is completed.** (Emphasis in bold supplied)

This same principle appears in § 422 of the Restatement of Torts, 2d:

§ 422. Work on Buildings and Other Structures on Land

A possessor of land who entrusts to an independent contractor construction, repair, or other work on the land, or on a building or other structure upon it, is

subject to the same liability as though he had retained the work in his own hands to others on or outside the land for physical harm caused to them by the unsafe condition of the structure

(a) while the possessor has retained possession of the land during the progress of the work, or

(b) **after he has resumed possession of the land upon its completion.** (Emphasis in bold supplied)

The maritime relationship between a shipowner and a stevedore is analogous to the land side relationship between a property owner and an independent contractor engaged to perform work on the property owner's land in that the stevedore is hired to perform work on the vessel, in connection with which work the stevedore brings its own employees on board the vessel and assumes principle control over the physical area where the cargo work is being performed; however, once that work is completed, the stevedore leaves the vessel and control over the area where the stevedore was working reverts back to the vessel. The principle is clear under land side law that, once the independent contractor has completed his work, control of the property reverts back to the property owner at which point the property owner has duty to inspect that work and to remedy any unsafe conditions found to exist. The Third Circuit's decision in the instant case and in *Derr*, in holding that a shipowner has no duty to inspect the work of a loading stevedore once the work of the loading stevedore has been completed, totally ignores this principle and the Congressional mandate as set forth in the Legislative History, and thereby deprives an injured longshoreman of an important part of the remedy which Congress has so clearly stated that the longshoreman was to have.

The non-employer stevedore is in a much different position from the employer stevedore in that, under the 1972 amendments, the vessel can still sue the non-employer stevedore for indemnity under the *Ryan Stevedoring* doc-

trine[9] should the shipowner be found liable for damages to an injured longshoreman, see *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1304 (9th Cir. 1981). Moreover, as between the shipowner and the injured longshoreman's stevedore employer, it is the shipowner which is best in position to prevent unsafe conditions from being created in a cargo stow by a loading stevedore, *Ibid*, see also *Woods v. Sammisa Co., Ltd., supra*, 873 F.2d at 855 (47a-48a).

In enacting the 1972 amendments to Section 5(b) of the Longshore and Harbor Workers' Compensation Act, one of the principle concerns of Congress in retaining the longshoreman's negligence remedy was to encourage vessel safety and the protection of the health and safety of longshoremen (20a). The Third Circuit decisions which severely limit the vessel's responsibility for unsafe conditions created in a cargo stow by a loading stevedore are in conflict with this objective. Accordingly, it is respectfully submitted that this Court should grant certiorari to resolve the conflict in decisions between the Third Circuit and the Fifth Circuit and clarify the law with respect to the vessel's responsibility for hazardous conditions created in a cargo stow by a loading stevedore.

---

9. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 100 L.Ed. 133 (1956).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment below.

Respectfully submitted,

Charles Sovel
Freedman and Lorry, P.C.
800 Lafayette Building
5th and Chestnut Sts.
Philadelphia, PA 19106
(215) 925 - 8400
Attorneys for Petitioner

90-372

Supreme Court, U.S.
FILED
AUG 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90 -

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT GIGANTE,
Petitioner,

v.

RUNSHIP, LTD., and
LAURITZEN REEFERS, A/S,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Charles Sovel, Esq.
Freedman and Lorry, P.C.
800 Lafayette Building
5th and Chestnut Streets
Philadelphia, PA 19106
(215) 925-8400
Attorneys for Petitioner

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROBERT GIGANTE, Plaintiff,	:	Civil Action No. 88-689
	:	OPINION
v.	:	
RUNSHIP, LTD. and LAURITZEN REEFERS, A/S and UNITED TRADING COMPANY, S.A. and TRANSREEFER, Defendants.	:	

RODRIGUEZ, District Judge

This matter comes before the court on a motion by defendants Runship Ltd. and Lauritzen Reefers, A/S for summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons stated herein, the court will grant the motion.

I.

This action arises out of the injury to plaintiff, Robert Gigante, while unloading a shipment of fruit from the Malayan Reefer. At the time of the incident the Malayan Reefer was owned by defendant Runship, Ltd., and operated by defendant Lauritzen Reefers, A/S.

The fruit, shipped from Chile, was packed in cardboard boxes and strapped onto wooden pallets. The pallets were loaded by an independent stevedore in Chile with a certain number of pallets in the center of each deck pre-slung with nylon cords so that they could be lifted from the hold by use of the ship's cargo hook. The area cleared by the removal of the pre-slung units, referred to as a "key", was made up of 13 units of palletized fruit

and consisted of an area of approximately 13 feet by 13 feet. After these units were removed from the key, a four-pronged chandelier spreader was used to begin discharging the remaining pallets. This particular type of chandelier enabled the longshoremen to discharge two pallets at a time.

Plaintiff and a co-worker, standing in the key, positioned the prongs of the chandelier spreader under two pallets and discharged them without incident. Utilizing the same procedure, plaintiff and his co-worker positioned the prongs of the chandelier under two more units. As the cargo was being lifted out of the hold one of the pallets broke causing several cartons to fall back into the key, some of which struck and injured plaintiff.

Plaintiff contends that the size of the key was inadequate and as a result he was unable to position himself in such a manner so as to be out from under the pallets. Plaintiff also alleges that defendants knew and actually participated in the creation of this condition, and were negligent in allowing the dangerous condition to exist when they knew no action would be taken to remedy it.

Defendants moved for summary judgment claiming that as a matter of law they owed no duty of care to plaintiff. Defendants allege that the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), as amended in 1972, limits a shipowner's liability to its own negligence, similar to the liability of a land-based third party in a non-maritime claim. Defendants claim that under Scindia Steam Nav. Co. v. De Los Santos 451 U.S. 156 (1981) and Derr v. Kawaski Kisen, K.K., 835 F.2d 490 (3rd Cir. 1987), a shipowner (1) has no duty to supervise or inspect the cargo or the loading or unloading of the stevedores, (2) has no duty to warn the stevedore of open and obvious dangers, and (3) has a duty to warn of hidden dangers only if the shipowner has actual knowledge of the danger and the condition is not open and obvious. Furthermore, defendants assert that they were not actively involved in the loading or unloading of the cargo and, even if they could be considered actively involved, the condition of the stow was open and obvious thereby relieving them of any duty to the stevedore. They also claim that they had

no actual knowledge of a dangerous condition and that there is no evidence that the size of the key presented an unreasonable risk of harm.

In response plaintiff claims that under § 905(b) a shipowner may be held liable for the injury to a longshoremen if the injury resulted from (1) the shipowner's actual negligence or (2) unsafe conditions of which the shipowner knew or had reason to know and of which the shipowner could not reasonably rely on the stevedore to correct or prevent from causing injury.

Plaintiff alleges that under the test set forth by Justice Brennan in his concurrence in Scindia, and employed by the Third Circuit in Griffith v. Wheeling-Pittsburgh Steel, 657 F.2d 25, 28 (3d Cir. 1981), defendants had a duty to protect the longshoremen. Justice Brennan stated that

> if the shipowner has actual knowledge that equipment in the control of the stevedore is in an unsafe condition, and a reasonable belief that the stevedore will not remedy that condition, the shipowner has a duty either to halt the stevedoring operation, to make the stevedore eliminate the unsafe condition, or to eliminate the unsafe condition itself.

Scindia, 451 U.S. at 179 (Brennan, J. concurring). Plaintiff claims there is an abundance of evidence regarding defendants' actual knowledge of the dangerous condition, i.e., the inadequate size of the key, and therefore defendants may be held liable.

II.

The entry of summary judgment is appropriate only when "there is no genuine issue of material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317 (1986). "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

which that party will bear the burden of proof at trial. In such a case there can be no genuine issue as to a material fact...." Celotex, 477 U.S. at 322-323. Whether a fact is indeed "material" is determined by the controlling substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If a disputed fact exists and under the controlling substantive law might affect the outcome of the suit, then entry of summary judgment is precluded. Id.

III.

Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, and as set forth in 33 U.S.C. § 905(b) provides in relevant part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel was a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel.... The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

Prior to the 1972 amendment, longshoremen could prevail in an action against a shipowner on either a negligence or breach of seaworthiness theory regardless of the fact that the shipowner was

not responsible for the unsafe condition.[1] See Scindia, 451 U.S. at 164-65. However, in discussing the 1972 amendment, the Third Circuit in Derr pointed out that "[t]he intention of Congress to eliminate the vessel's liability without fault was express and unambiguous." 835 F.2d at 492. Congress felt it was unfair to predicate a vessel's liability on a no-fault theory of seaworthiness. "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in a non-maritime employment ashore, insofar as bringing a third party damage action is concerned...." Id. (quoting H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S. Code Cong. & Ad. News 4698, 4703). Furthermore, "[t]he vessel was not to be liable ... for acts or omissions of stevedores, or of the employees of stevedores, for the manner in which the stevedore performed its work.... Its liability was to be 'based on its own negligence' and could be proved only if it was shown to have acted or failed to act in a negligent manner...." Scindia, 451 U.S. at 166 n. 13 (citing S. Rep. No. 92-1125, p. 10 (1972)).

IV.

Scindia involved a longshoreman injured by cargo that fell from a pallet suspended overhead while he was working in the ship's hold. The ship's winch, operated by another longshoreman, had been malfunctioning for approximately two days before the incident. The court held that the district court erred in granting summary judgment since there was a triable issue as to whether the shipowner knew of the defective equipment or was chargeable with such knowledge. Scindia, 451 U.S. at 178.

In Derr the Third Circuit addressed the issue of "what liabili-

---

1. If it was found that the unsafe condition was brought into play by the stevedore or its employees, rather than the shipowner, the shipowner could bring a claim against the stevedore for breach of express or implied warranty to handle the cargo in a safe manner. Scindia, 451 U.S. at 165 (citing Ryan Stevedore Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956).

ty, if any, a vessel has for injuries to longshoremen caused by cargo improperly loaded by a ... stevedore." 835 F.2d at 490. Derr consolidated separate but similar accidents in which cargo fell upon longshoremen during the unloading of a vessel. The court held that "[a] vessel can be deemed negligent towards a longshoreman injured because of improperly stowed cargo only if the vessel has breached one of the limited duties referred to in Scindia. Id. at 497. The court, finding no evidence the defendant breached any of these narrow duties, affirmed the directed verdict for the owner of the vessel.

The Derr court summarized the duties of a shipowner as delineated in Scindia as follows:

> The vessel has a duty with respect to the general condition of the ship's gear, equipment, tools and work space, and a duty to warn the stevedore of hidden dangers which are or should be known to the vessel in the exercise of reasonable care, and that are not known or obvious to the stevedore, Id. 451 U.S. at 167, 101 S.Ct. at 1622. Also, if the vessel actively involves itself in the cargo operation, or fails to exercise due care in protecting longshoremen from dangers they might encounter from equipment under vessel's active control, it would be negligent. Id. However, with respect to cargo not loaded by or under the active supervision of the vessel, the court explained that the vessel could rely on the expertise of the stevedore, Id. at 17-71, 101 S.Ct. at 1623-24; see, e.g., Kakauas, 789 F.2d at 118 ('The basic theme of the Scindia opinion is the extensive reliance that a shipowner may justifiably place on an independent contractor.').
>
> The stevedore, in turn, who is in the best position to avoid accidents during the cargo operation, has a statutory duty to provide for the safety of longshoremen ... and warrants to the vessel that [it] will perform competently. Scindia, 451 U.S. at 170-71, 101 S.Ct. at 1623-24.

835 F.2d at 493.

The Derr court then affirmed the distinction made by the District Court "between unsafe conditions resulting from the manner in which cargo is stowed and other types of unsafe conditions." Id. The court stated: "We read the [Supreme] Court's opinion in Scindia . . . as limiting the vessel's potential liability for injuries caused by faulty stowage of cargo to certain narrow circumstances." Id.

A. Duty to Supervise or Inspect

The Derr court, compelled by Scindia, found that "the shipowner has no duty to supervise or inspect cargo loaded or unloaded by stevedores and therefore may not be held liable for injuries arising out [of] the stevedore's failure to perform [its] job properly." Id. The court stated that "creation of a shipowner's duty to oversee the stevedore's activity and insure the safety of the longshoremen would ... saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b).... As Scindia makes clear, the 1972 amendments are grounded in the belief that stevedores are primarily responsible for the stowage of cargo." Id. at 494-95 (citations omitted). Therefore, under Derr there can be no duty imposed upon the shipowner to inspect or supervise the work of the stevedore.

In a similar context, plaintiff argues that the observation of both the cargo and the size of the key by Captain Pavar in the Port of Philadelphia and the certification of the stowage by the Master and Chief Mate in Chile may be considered active involvement and give rise to a duty on the part of the shipowner. However, the Derr court explicitly negated such an argument. "Even if it were true that a vessel ... observes the loading of cargo, ... such observation cannot be used to reimpose the general duty to supervise the stevedore. Nor can such observation be vaulted into the type of active involvement and control that would trigger a ship's liability." Id. at 494 (citations omitted). Therefore, any observation by the shipowner does not rise to the level of active involvement and cannot be used to impose a duty upon the shipowner to supervise or inspect.

B. Duty To Warn

Because the ship has no duty to inspect the cargo stowage operations, the ship can be held liable only for failure to warn of improper stowage, if at all, when the ship has both actual knowledge and the danger was not open and obvious." Id. at 496. The Derr court agreed with the district court that if the danger was open and obvious there was no warning which a shipowner could have provided which would have added to the knowledge of a competent and experienced stevedore. In the present case the condition of the stow and the size of the key was open and obvious and known to the stevedore. Therefore, there can be no duty to warn placed upon the shipowner.

C. Duty to Intervene in Cargo Operations

The Derr court also employed the Scindia definition of a shipowner's duty with respect to the ship and its equipment. The court stated that a shipowner has a duty to

> exercis[e] ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warn[] the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Id. at 495 (quoting Scindia, 451 U.S. at 167).

Plaintiff does not contend that the ship in this case was defective or that there was a defect in any of the ship's equipment, gear, tools or work space, but instead claims it was the

condition of the cargo which gave rise to a duty. The Derr court, however, in discussing the meaning of the term "work space" in Scindia, stated that the Supreme Court could not have intended the duty of a shipowner with respect to its physical work space to establish a duty by the ship with respect to cargo. The court clearly distinguished between a duty arising from the ship and its equipment and that arising from the stowage of cargo.

With this in mind, the Third Circuit addressed the "parameters of the vessel's duty to intervene in cargo operations." Derr, 835 F.2d at 496. The court felt that the Supreme Court in Scindia had not fully addressed this issue. "The only discussion in that opinion related to the shipowner's 'duty to act where the danger to longshoremen arises from the malfunctioning of the ship's gear being used in the cargo operations.'" Id. (quoting Scindia, 451 U.S. at 175). The Derr court summarized the holding in Scindia as follows:

> The Scindia court was prepared only to hold that if it were proven that the ship knew of the malfunctioning cargo winch that was part of the ship's own gear, and which it might have a duty to repair, there was a basis for imposition of the negligence liability.

Id. (Emphasis added). The court further concluded that

> it is unlikely that the narrow duty of a ship to intervene to make repairs was intended to extend beyond defective conditions with respect to the ship, its equipment, and gear.... Since the ship has no duty to inspect the cargo handling operation or the stowed cargo, Scindia, 451 U.S. at 178, 101 S.Ct. at 1627; see Taylor v. Moram Agencies, 739 F.2d 1384, 1386-87 (9th Cir. 1984) ('[t]he scope of a shipowner's duty as set forth in Scindia focuses on the character of the ship and its equipment -- not on the nature of the cargo'), there would ordinarily be no duty to intervene to remedy

dangers created by negligently loaded cargo.[2]

835 F.2d at 496.

Plaintiff argues that the proper test to be applied here was articulated by Justice Brennan in his concurrence in Scindia. This test requires that "the shipowner [have] actual knowledge that equipment in the control of the stevedore is in an unsafe condition, and a reasonable belief that the stevedore will not remedy that condition...." Scindia, 451 U.S. at 179. (Emphasis added). Justice White, in delivering the opinion of the Court in Scindia, stated that the test required the shipowner have actual knowledge that the defective equipment posed an "unreasonable risk of harm," as opposed to an "unsafe condition."[3] Scindia, however, refers specifically to "equipment" of the ship, and not cargo. Therefore, this court need not choose which Scindia test to apply in determining a shipowner's duty for negligently stowed cargo. The Derr court has explicitly defined the parameters of a shipowner's duty for negligently stowed cargo. In this respect Scindia is factually distinguishable from the case at hand and will be followed only to the extent to which it has been adopted by the Third Circuit in Derr.

Plaintiff cites the case of Griffith v. Wheeling-Pittsburgh Steel Corp., 657 F.2d 25 (3rd Cir. 1981) as supporting its contention that the shipowner has a duty based on his actual knowl-

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2. The Derr court noted that "[t]here was nothing in either case to suggest that the cargo presented an exceptional situation. We leave open the issue of a duty by the ship in such circumstances." Derr, 835 F.2d at 496 n.3. Similarly, there is nothing in the present case to suggest the cargo presented the type of exceptional situation referred to in Derr.

3. Similarly, the Third Circuit in Griffith v. Wheeling-Pittsburgh Steel, 657 F.2d 25 (1981), although explicitly distinguishing Scindia, applied a similar test requiring that "the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship...." Id. at 27.

edge of the dangerous condition and the reasonable belief that the stevedore will not remedy it. The court in Griffith found a barge owner to be negligent where, prior to turning control of the barge over to the stevedore, the owner knew of a defective hatch cover, and had reason to believe the stevedore might use a negligent method to remove the covers, but took no steps to intervene.[4] Id. at 28. Griffith, like Scindia, is clearly distinguishable from this case since it deals solely with the ship and its equipment and not with the stowage of cargo.

V.

In the present case the shipowner has no duty to plaintiff for which he may maintain a cause of action. There was no duty on the part of defendants to supervise or inspect the cargo, or the loading or unloading of the stevedore. There was no duty to warn, even if defendants had actual knowledge as plaintiff claims, since the condition of the cargo and the size of the key were open and obvious. Finally, the shipowner had no duty to intervene because the dangerous condition was related to the negligent stowage of cargo and not to the ship's equipment or gear.

Therefore, because plaintiff has produced no evidence that defendants have breached any of the limited duties referred to in Derr, the motion of the defendants for summary judgment will be granted.

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4. The Court distinguished the case from Scindia because Scindia dealt with discovery of a dangerous condition which "developed during" the cargo operations and which had not been brought to the shipowner's attention prior to commencement of stevedoring operations, whereas Griffith dealt with a defect in the ship which the owner knew of "prior" to turning control over to the stevedore. Griffith, 657 F.2d at 27.

An appropriate order will be entered.

/s/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
U.S.D.J.

Dated: August 16, 1989

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROBERT GIGANTE, Plaintiff,	: Hon. Joseph H. Rodriguez
	: Civil Action No. 88-689
v.	:
	: ORDER
RUNSHIP, LTD. and LAURITZEN REEFERS, A/S and UNITED TRADING COMPANY, S.A. and TRANSREEFER, Defendants.	:

For the reasons set forth in this court's opinion filed even date;

IT IS on this 16th day of August, 1989, ORDERED that the motion for summary judgment of the defendants, Runship, Ltd. and Lauritzen Reefers, A/S, is hereby GRANTED.

/s/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5909

ROBERT GIGANTE,
Appellant

vs.

RUNSHIP, LTD.
and LAURITZEN REEFERS, A/S
and UNITED TRADING COMPANY S.A.
and TRANSREEFER

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 88-00689)
District Judge: Honorable Joseph H. Rodriguez

Submitted Under Third Circuit Rule 12(6)
April 26, 1990

Before: BECKER, GREENBERG, Circuit Judges
and DUMBAULD, District Judge*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. See Derr v. Kawasaki Kisen, K.K., 835 F.2d 490 (3rd Cir. 1987)

Costs taxed against appellant.

BY THE COURT,

_____
Circuit Judge

ATTEST:

_____
Clerk

DATED: May 8, 1990

* Honorable Edward Dumbauld, United States District Judge for the Western District of Pennsylvania, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5909

ROBERT GIGANTE,

Appellant

vs.

RUNSHIP, LTD.
and LAURITZEN REEFERS, A/S
and UNITED TRADING COMPANY S.A.
and TRANSREEFER

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 88-00689)

SUR PETITION FOR REHEARING

PRESENT: HIGGINBOTHAM, Chief Judge, and SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICACIRICA, COWEN, and NYGAARD, Circuit Judges, and DUMBAULD, District Judge* **

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, except for Judge Becker who voted for rehearing but only in banc, and a majority of the circuit judges of the circuit in regular active serv-

ice not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Becker would grant rehearing so that the court in banc might reconsider Derr v. Kawasaki Kisen K.K., 835 F.2d 490 (3d Cir. 1987), cert denied, 486 U.S. 1007 (1988).

Judges Scirica and Cowen would grant rehearing by the court in banc.

BY THE COURT:

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Circuit Judge

DATED: June 5, 1990

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* Honorable Edward Dumbauld, United States District Judge for the Western District of Pennsylvania, sitting by designation.

** as to panel rehearing only.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972

HOUSE REPORT NO. 92-1441

(as reported at 1972 U.S. Code Cong. and Adm. News beginning at page 4698)

* * *

[4701]

Elimination of Unseaworthiness Remedy

One of the most controversial and difficult issues which the Committee has been required to resolve in connection with this bill concerns the liability of vessels, as third parties, to pay damages to long-

[4702]

shoremen who are injured while engaged in stevedoring operations. The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act. The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.

The Committee also rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel. Vessels have been held to what amounts to such absolute liability by decisions of the Supreme Court, commencing with *Seas Shipping Co. v. Sieracki*, 328 U.S. 25 (1946) which held that the traditional seamen's remedy based on the breach of the

vessel's absolute, nondelegable duty to provide a seaworthy vessel was also available to longshoremen and others who performed work on the vessel which by tradition has been performed by seamen. Under the *Sieracki* case, vessels are liable, as third parties, for injuries suffered by longshoremen as a result of "unseaworthy" conditions even though the unseaworthiness was caused, created, or brought into play by the stevedore (or an employee of the stevedore) rather than the vessel or any member of its crew. For example, under present law, if a member of a longshore gang spills grease on the deck of a vessel and a longshoreman slips and falls on the grease a few moments later, the vessel is liable to pay damages for the resulting injuries, even though no member of the crew was responsible for creating the unseaworthy condition or was even aware of it. Furthermore, in the example given above, under the Supreme Court's decision in *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), the vessel may recover the damages for which it is liable to the injured longshoreman from the stevedore which employed the longshoreman on the theory that the stevedore has breached an express or implied warranty of workmanlike performance to the vessel. The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine.

The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were not being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases. The Committee also heard testimony

that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Committee's attention was also called to the decision in 1966 of the United States district court in Philadelphia concerning the impact of third party claims involving injured longshoremen on the backlog of personal injury cases in that court.

The Committee also has taken note of the inescapable fact that the controversy over third party claims by longshoremen has had political ramifications which have resulted in forestalling any improvements in the present Act for over twelve years.

The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels. In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.

Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-

based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.

Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act, *Crumedy v. The J. H. Fisser*, 358 U.S. 423, *Albanese v. Matts*, 382 U.S. 283, *Skibinski v. Waterman SS Corp.*, 330 F.2d 539; for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work, *A. N. G. Stevedores v. Ellerman Lines*, 369 U.S. 355, *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367; for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, *Alaska SS Co. v. Peterson*, 347 U.S. 396, *Italia*

[4704]

Societa v. Oregon Stevedoring Co., 376 U.S. 315, or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence.

Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation -- just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position *vis a vis* his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.

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Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries.

Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.

[4705]

Under the proposed amendments the vessel may not by contractual agreement or otherwise require the employer to indemnify it, in whole or in part, for such damages.

The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yaka*, 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.

Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in differ-

ent ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption to risk" in an action by an injured employee shall also be applicable.

Finally, the Committee wishes to emphasize that nothing in this bill is intended to relieve any vessels or any other persons from their obligations and duties under the Occupational Safety and Health Act of 1970. The Committee recognizes that progress has been made in reducing injuries in the longshore industry, but longshoring remains one of the most hazardous types of occupations. The Committee expects to see further progress in reducing injuries and stands ready to immediately reexamine the whole third party suit question if it appears that the changes made in present law by this bill have affected progress in improving occupational health and safety.

John WOODS and Beverly Woods, Plaintiffs-Appellees, and Cooper/T. Smith Stevedores, Intervenor-Appellee, v. SAMMISA COMPANY, LTD., et al., Defendants. SAMMILINE COMPANY, LTD., and Hightworth Shipping Ltd., Defendants-Third Party Plaintiffs-Appellants, Cross-Appellees, v. PIONEER NAVIGATION, LTD., Defendant-Third Party Defendant-Appellee, Cross-Appellant.

No. 88-3113

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

873 F.2d 842 (May 30, 1989)

Rehearing and Rehearing En Banc Denied June 30, 1989

Before GEE, SMITH and DUHE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

In this case, our primary task is to determine when, and to what extent, the defendants in this action--a vessel owner/operator and a time charterer--are liable for injuries suffered by a longshoreman while discharging cargo from the vessel. After a trial on the merits, the jury found, using the principles enunciated in *Scindia Steam Navigation Co. v. De los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), that both defendants, as well as the stevedore, the longshoreman's employer, were responsible for the longshoreman's injuries. The district court apportioned liability between the owner/operator and the time charterer according to the respective percentages of fault assigned to each by the jury. Both defendants appeal on numerous grounds. Because we conclude that two out of the three theories of liability on which the jury was charged should not have been presented to the jury, we vacate the judgment and remand for a new trial.

I.

A.

Plaintiff John Woods was a longshoreman employed by Cooper/T. Smith Stevedores ("Cooper/T. Smith" or the "stevedore") in New Orleans. In 1984, he was part of a crew of longshoremen assigned to discharge a quantity of steel pipe located in the hold of the M/V SAMMI HERALD. The hold contained two rows, running fore and aft along its length, of loosely-bundled steel pipe, stowed pipe-to-pipe with little dunnage. In the forward half of the hold was steel pipe bound for Houston (the "Houston pipe"); the aft half contained the pipe which Woods's crew was directed to discharge (the "New Orleans pipe"). The Houston pipe was stacked considerably higher than the New Orleans pipe.

When the longshoremen looked into the hold before beginning discharge operations, they immediately noticed that, to varying degrees, the aft ends of some of the Houston pipe overlapped the forward ends of the New Orleans pipe. All parties agree that the overlapping condition of the cargo was created by the stevedore that loaded the pipe in Brazil. Testimony at trial indicated that, although the overlapping condition of the cargo was not unprecedented, the more common method of stowing steel pipe was to leave an "alley-way" between the two sets of pipe such that either set of pipe could be lifted vertically without coming into contact with the other.

The longshoremen agreed among themselves that it was a "bad stow," and the crew's superintendent told members of the ship's crew that the discharge would have to proceed very slowly because of the cargo's condition. The crew, including Woods, nonetheless was instructed to discharge the New Orleans pipe, although it was told to proceed as carefully as necessary, even if that meant discharging the cargo one pipe at a time.

Woods and his fellow longshoremen began to discharge the New Orleans pipe using the "break out" method, taking small quantities of pipe and attempting to maneuver them around the

overlapping Houston pipe and out of the hold. The discharge proceeded uneventfully for about two hours until disaster struck. While the crew was discharging a three- or four-pipe bundle of New Orleans pipe, the forward end of the bundle became "jammed" in some overlapping Houston pipe, which caused the aft ends of one or more pieces of the New Orleans pipe to swing violently in the direction of Woods and the other longshoremen standing nearby in the hold. The longshoremen attempted to run across the uneven surface of the pipe cargo to avoid being struck by the swinging pipe. Woods was unable to avoid serious injury, however, when he fell into a gap between several pipes and was struck by the swinging pipe.

B.

After collecting workers' compensation and medical benefits from Cooper/T. Smith, Woods and his wife sued Sammiline Company, Ltd. ("Sammiline"), the operator of the vessel, and Hightworth Shipping, Ltd. ("Hightworth"), the vessel's owner (collectively, the "owner/operator"), for damages under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b). Cooper/T. Smith immediately intervened, seeking reimbursement of its payments made to Woods.

Sammiline and Hightworth denied liability; additionally, Hightworth filed a third-party complaint against Pioneer Navigation, Ltd. ("Pioneer"), the time charterer of the vessel, alleging that if the vessel interests were in any way responsible for Woods's injuries, Pioneer was the responsible party. Pursuant to Fed.R.Civ.P. 14(c), Hightworth also tendered Pioneer as a direct defendant to the plaintiffs. To round out this flurry of procedural machinations, Pioneer cross-claimed against Hightworth, alleging that the owner/operator was solely responsible for Woods's injuries, and the Woodses then filed an amended complaint naming Pioneer as a defendant.

After a trial on the merits, the jury returned a verdict in which it found that the owner/operator, the time charterer, and the stevedore were all negligent and that each party's negligence was

a legal cause of Woods's injuries. When asked to apportion responsibility for Woods's injuries, the jury found the owner/operator 10% responsible, the time charterer 25% responsible, and the stevedore 65% responsible. Finally, the jury awarded Woods $ 550,000 for his injuries, and Woods's wife $150,000 for loss of consortium.

The district court then considered the question of liability between the owner/operator and time charterer. It denied each party's claim for indemnity from the other and, because the stevedore was not a defendant in the action, apportioned the stevedore's 65% responsibility between the owner/operator (10/35 of 65%, or 18.57%) and time charterer (25/35 of 65%, or 46.43%) in proportion to the percentage of fault assessed by the jury against the two defendants.[1] Judgment was entered accordingly, with Cooper/T. Smith recovering its past compensation and medical expenses out of Woods's recovery.[2]

II.

Both the owner/operator and the time charterer vigorously contest the jury's findings that they were legally responsible for Woods's injuries. Because the defendants filed the requisite motions for directed verdict and judgment notwithstanding the verdict, we review the jury's findings using the standard enunciated in *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir.1969) (en banc). Thus, we review the record to see whether "there is substantial evidence of such quality and weight that

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1. Under the rule of *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979), the owner/operator and the time charterer were held responsible for the stevedore's negligence as well as their own. *See Hill v. Texaco, Inc.*, 674 F.2d 447, 449 (5th Cir.1982).

2. Under the LHWCA, an injured worker's employer is entitled to reimbursement for its past compensation and medical expenses from the net proceeds of any recovery by the injured worker from a third party. *See Peters v. North River Ins. Co.*, 764 F.2d 306, 312 (5th Cir. 1985).

reasonable and fair-minded [persons] in the exercise of impartial judgment might reach different conclusions." *Id.* at 374.

A.

Title 33 U.S.C. § 905(b), provides in pertinent part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly . . . .

Neither the owner/operator nor the time charterer contends that it is not amenable to suit under section 905(b);[3] rather, their first argument on appeal is simply that they have not breached any duties owed to Woods.

In *Scindia*, the Supreme Court clarified the scope of the duties owed by a vessel to stevedores and longshoremen. Starting from the general proposition that a "shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards," 451 U.S. at 170, 101 S.Ct. at 1623, the Court stated that the vessel nonetheless "owes to the stevedore and his longshoremen employees the duty of exercising due care 'under the circumstances.'" *Id.* at 166, 101 S.Ct. at 1622 (quoting *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 415, 89 S.Ct. 1144, 1150, 22 L.Ed.2d 371 (1969)). The Court

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3. Title 33 U.S.C. § 902(21) defines "vessel" as including the vessel's "owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member." We have previously held that time charterers are included within the definition and are therefore amenable to suit under § 905(b). *See Kerr-McGee Corp. v. Ma-Ju Marine Servs., Inc.*, 830 F.2d 1332, 1338 (5th Cir. 1987).

identified three aspects of this limited duty, only two of which are relevant here.[4]

First, the Court indicated that the vessel must exercise ordinary care

> to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety . . . .

Id., 451 U.S. at 167, 101 S.Ct. at 1622. A corollary of this first *Scindia* duty, the Court explained, is that the vessel has a duty to warn the stevedore of any hazardous conditions on the ship or with respect to its equipment of which the stevedore cannot be expected to be aware, but of which the vessel has or should have knowledge. *Id.* Although the Court did not explicitly so hold, this duty apparently governs the vessel's conduct before stevedoring operations have begun.[5]

The third *Scindia* duty is somewhat more nebulous and applies to the vessel's responsibilities once stevedoring operations are underway. As to this duty, the Court began its discussion by again postulating that "the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." 451 U.S. at

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4. In what may be identified as the second *Scindia* duty, the Court stated that a vessel may be liable "if it actively involves itself in cargo operations and negligently injures a longshoreman" or if it fails to exercise due care in maintaining equipment and areas of the ship over which it has "active control" during the stevedoring operation. 451 U.S. at 167, 101 S.Ct. at 1622. The jury in this case was not charged on this theory; thus we have no reason to consider it on appeal.

5. *See Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 535 (5th Cir.1986); *Stass v. American Commercial Lines, Inc.*, 720 F.2d 879, 882 (5th Cir. 1983); *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243, 1246-47 (5th Cir.1982).

172, 101 S.Ct. at 1624. The Court reasoned, however, that a shipowner nonetheless could be liable under section 905(b) if it had actual knowledge of a dangerous condition present during the stevedoring operation and actual knowledge that the stevedore was not acting to correct it:

> [I]f [the stevedore's] judgment . . . was so obviously improvident that [the vessel], if it knew of the defect and that [the stevedore] was continuing to use it, should have realized the [defect] presented an unreasonable risk of harm to the longshoremen, . . . [the vessel] had a duty to intervene [and correct the defect].

Id. at 175-76, 101 S.Ct. at 1626-27. *See also Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1038-39 (5th Cir.1983).[6]

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6. The *Scindia* Court uses the word "vessel" throughout, thereby arguably suggesting that the opinion applies to all parties within the statutory definition. We have previously interpreted *Scindia*, however, as establishing the duties owed to stevedores and longshoremen only by owner/operators. *See Kerr-McGee*, 830 F.2d at 1340 n. 8.

The underlying principle is that each defendant in a § 905(b) action is liable only for its own negligence, which presupposes the identification of the specific duties owed by each defendant to the plaintiff. *Scindia* determines the duties owed by owner/operators, which have actual dominion and control over the vessel; it does not determine the duties owed by other defendants, such as time charterers, that are similarly amenable to suit under § 905(b) but whose relationships to the vessel, and therefore to the plaintiff, differ from that of the owner/operator. We thus must look to the time charterer's relationship with the vessel--primarily, as defined in the time charter--to discover the duties and responsibilities against which the time charterer's conduct must be measured. *See Kerr-McGee id.* at 1339.

On appeal, the time charterer nonetheless proceeds to assess its own liability primarily in terms of the *Scindia* duties imposed upon owner/operators. Except where otherwise noted, therefore, we will assume that the time charterer's duties toward the stevedore and its longshoremen employees are co-extensive with the owner/operator's duties under *Scindia*: hence, we utilize the same analysis of the Woodses' claims for each defendant.

B.

Initially, the defendants challenge the essence of the Woodses' action by questioning whether a vessel's duties under Scindia extend to the vessel's cargo, as distinguished from its gear and equipment. However, settled case law in this circuit forecloses the conclusion that a vessel does not, with regard to the stevedore and longshoremen, bear any responsibility for the vessel's cargo and its manner of stowage.

The defendants' argument is predicated upon a close reading of *Scindia*, which involved a section 905(b) complaint filed by a longshoreman whose injury resulted from a defective winch that was part of the ship's gear being used in cargo operations. The defendants therefore argue that the Court's statements regarding an owner/operator's duties must be read as delimiting its responsibilities for the things--*i.e.*, the ship's gear and equipment--over which it has dominion and actual control.

Thus, according to the defendants, when the Court stated that "the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore," 451 U.S. at 172, 101 S.Ct. at 1624, it meant what it said. This is so, the defendants contend, because actual control--the basis for the *Scindia* duties--over the cargo and cargo operations belongs, not to the owner/operator, but to the independent stevedore.

At least one court has accepted this argument under remarkably similar circumstances. In *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), *cert. denied*, U.S. , 108 S.Ct. 1733, 100 L.Ed.2d 196 (1988), two longshoremen suffered injuries while discharging cargo that had moved or shifted during the voyage after being improperly secured by the loading stevedore. The court rebuffed their attempt to hold the vessel's owner liable on the theory that it failed adequately to inspect or supervise the stowage of the cargo. Absent a contractual provision, positive law, or custom to the contrary, the court concluded,

> *Scindia* compels the holding that a shipowner has no duty to supervise or inspect cargo loaded or unloaded by stevedores and therefore may not be held liable for injuries arising out [sic] the stevedore's failure to perform his job properly.

Id. at 493.[7] As in *Derr*, the essence of the Woodses' claim is that the defendants failed to exercise proper control over the stowage and discharge of the pipe cargo; the defendants thus urge us to follow *Derr*'s lead and hold that a vessel cannot be held liable for injuries resulting from the negligence of an independent stevedore.

Our court, however, has already visited this question and reached the opposite result. In *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. Sept. 1981), decided shortly after *Scindia*, a longshoreman injured during discharge operations sued the vessel owner under section 905(b), alleging that the owner was legally responsible for the negligent manner in which the cargo had been stowed and that such negligence was the cause of his injuries. An independent stevedore had loaded the cargo, and the plaintiff sought to hold the owner liable because the chief mate had actual knowledge that the stevedore was utilizing improper loading techniques. *Id.* at 116.

Although we noted the language in *Scindia* to the effect that the shipowner has no duty to supervise cargo operations or inspect the cargo, we extended *Scindia*'s imposition of a duty on the shipowner to correct, as to all dangerous conditions including

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7. In reaching its holding, the *Derr* court went so far as to assume explicitly that the shipowner had actual knowledge of the fact that the cargo was improperly secured. That fact, the court concluded, could not suffice to create liability:

> Even if it were true that a vessel customarily observes the loading of cargo, understandable in light of its potential liability for certain damage to cargo, . . . we agree with the district courts that such observation cannot be used to be vaulted into the type of active involvement and control that would trigger the ship's liability.

835 F.2d at 494 (citations omitted).

those relating to cargo, equipment-related and other defects of which it has actual knowledge and which it actually knows the stevedore does not intend to correct. That duty extends to conditions that arise before or during stevedoring operations. In so holding in *Lemon*, we assumed that the shipowner has at least the power to control the actions of independent stevedores: We stated that this duty "furnishes an incentive to the shipowner to correct those dangerous conditions he recognizes in addition to those he actually creates." *Id.* at 115.

Without questioning our assumption that such power exists in theory and practice, we have continued to follow our holding in *Lemon*. *See Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 299 (5th Cir. 1984). Because we are bound by this court's prior decisions unless and until they are reconsidered en banc, we must decline to accept the defendants' argument that an owner/operator owes no duties to a stevedore and longshoreman with respect to cargo operations that are solely within the stevedore's control.[8]

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8. Even if we were able to accept the defendants' argument as to owner/operators, it is by no means clear that the same conclusion would obtain for time charterers. Again, the theory underlying the argument is that the owner/operator does not have practical dominion and control over cargo operations, the responsibility for which *Scindia* places in the hands of independent stevedores. At least in this case, however, practical dominion and control over the stevedores' actions may exist in the time charterer, which hired both the preparer of the cargo plan for the vessel and the loading and unloading stevedores. Presumably, it could have directed the stevedores' actions in accordance with its wishes, notwithstanding the fact that the stevedores legally may have been independent contractors.

The status of the relationship between the time charterer and the stevedores thus suggests that it is not unreasonable to place upon the time charterer some duty to exercise reasonable care in its actions with respect to the cargo and its stowage. Thus, even if the time charterer does not have a duty of supervision and inspection, it nonetheless may have a duty to correct hazardous cargo conditions of which it has actual knowledge, for the simple reason that it has the

C.

The Woodses claim that the owner/operator and the time charterer breached both of the above duties in three ways. Firstly, they contend that the two defendants, in violation of the first *Scindia* duty, were negligent in failing to ensure that the loading stevedore in Brazil stowed the pipe cargo in such a manner that it could be discharged in New Orleans with reasonable safety. Secondly, and also under the first *Scindia* duty, they contend that the defendants failed to warn Woods and his fellow longshoremen of the "hidden danger" presented by the gaps in the pipe cargo allegedly caused by the lack of dunnage and the loose stow. Their third theory of liability is that, because the pipe cargo as stowed could not be discharged with reasonable safety, the defendants, pursuant to the third *Scindia* duty, should have stopped the stevedore from proceeding to discharge the New Orleans pipe without first discharging the overlapping Houston pipe.

The district court charged the jury on all three theories of liability. Although it submitted the case to the jury on special interrogatories, the relevant interrogatory as to each defendant asked only whether that defendant was "negligent," to which the jury could answer "yes" if it found that defendant liable under any one or more of the three theories. In most cases, "[w]here two [or more] claims have been submitted to the jury in a single interrogatory, a new trial may be required if one of the claims was submitted erroneously," unless we are "'reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it.'" *Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir.), *cert. denied*, 469 U.S. 883, 105 S.Ct. 252, 83 L.Ed.2d 189 (1984) (quoting *E.I. duPont de Nemours & Co. v. Berkley & Co.*, 620 F.2d 1247, 1258 n. 8 (8th Cir.1980)). Thus, if we find

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practical ability to correct such conditions. Because we follow this court's precedent in holding that *Scindia* extends to conditions wholly within the cargo and its method of stowage, however, our discussion is restricted to pointing out the limitations of the defendants' argument and of the *Derr* court's reasoning.

that the defendants were entitled to a directed verdict on any one of the three theories of liability, we must remand the case for a new trial unless we are "reasonably certain" that the jury's verdict was not based upon the erroneously-submitted theory or theories.

1.

As noted, supra, it is the law in this circuit that, under the first *Scindia* duty, a vessel interest has an obligation to exercise due care to ensure that the vessel's cargo is loaded such that it can be discharged with reasonable safety.[9] The defendants may be found liable "for damages arising from a dangerous stow [in] situations where the [defendants] knew or should have known of the dangerous condition." *Harris*, 730 F.2d at 299 (citing *Lemon*, 656 F.2d at 116). In this case, neither defendant denies actual knowledge of the overlapping condition of the cargo; rather, they contend that the evidence does not establish either that the over-

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9. *See Harris*, 730 F.2d at 299 (analyzing a shipowner's actions regarding the stowage of cargo under the first *Scindia* duty); *Lemon*, 656 F.2d at 112, 116 (finding evidence sufficient to support a jury verdict that the shipowner had "breached a [*Scindia*] duty owed to longshoremen to exercise reasonable care in providing a reasonably safe work place" because the shipowner "was negligent in the method and manner of stowing the cargo"). Although we noted in *Harris* that "[i]f an independent contractor performs the loading operations, and the shipowner reasonably has no knowledge of a dangerous condition thereby created, the owner may escape liability," 730 F.2d at 299 n. 2, the cases cited for this proposition limit the scope of this exception to independent contractors "over whom [the shipowner] retained no control." *Moser v. Texas Trailer Corp.*, 694 F.2d 96, 98 (5th Cir.1982). As we note *infra*, both the owner/operator and the time charterer had, in both theory and practice, authority to control the actions of the loading stevedore in Brazil. The owner/operator's claim that it exercised actual control over cargo operations only insofar as they affected the seaworthiness and safety of the vessel may be a correct empirical statement, but it does not mean that it is relieved of the duties imposed upon it by, *e.g.*, *Scindia*, *Lemon*, *and Harris*.

lapping condition created an unreasonable risk of harm to the longshoremen or that they can be charged with knowledge of such a risk if it did exist. We disagree.

In *Harris*, a longshoreman sued a vessel owner after being injured while unloading sacks of coffee from the vessel. The sacks were not "tied," a procedure in which the sacks are stacked to provide greater stability, nor were they separated by dunnage, which are wood platforms placed every five sacks high. According to testimony from the injured worker and his fellow longshoreman, the stow was "dangerous" in that the coffee was "very, very poorly stored." Additional testimony indicated that it was customary in the industry for the ship to decide whether to use dunnage, that the use of dunnage involved added expense, and that the owners of the vessel never used dunnage.

We reversed the district court's grant of a directed verdict for the vessel owner. Although our attention was focused primarily upon whether the obviousness of the danger presented by the stow relieved the vessel owner of liability, our conclusion regarding the legal sufficiency of the evidence described above is unmistakable:

> The evidence presented by Harris would have been sufficient to support jury findings that Grancolombiana was negligent in providing an unreasonably dangerous place to work and that Harris's injuries were caused by this dangerous condition. The case should not have been taken from the jury . . . .

Id. at 300.

Our holding in *Harris* guides our determination of the defendants' sufficiency-of-the-evidence argument on this point. As in *Harris*, there was ample testimony in this case to support a jury finding that the overlapping condition of the cargo meant that the New Orleans pipe could not be discharged with reasonable safety. Testimony at trial indicated that an overlapping stow was unusual, that it increased the risk of damage to the cargo and

injury to the longshoremen, and that those risks could have been avoided by either stowing the Houston pipe without having it overlap the New Orleans pipe--as was contemplated by the cargo plan prepared for the time charterer--or unloading the overlapping Houston pipe before unloading the New Orleans pipe.[10] In sum, there is ample evidence from which a jury could conclude that the defendants therefore did not exercise reasonable care in providing the longshoremen with a reasonably safe place in which to work.

The defendants offer two arguments against this conclusion. Firstly, they assert that, although there was evidence that the overlapping condition of the cargo meant that the discharge would have to proceed "slowly," there was no evidence that the condition of the cargo presented an unreasonable risk of harm to the longshoremen. Secondly, they contend that there was no evidence that the defendants, through their employees, had any knowledge that the stow presented an unreasonable risk of harm.

The defendants' first argument is plainly foreclosed by Harris. There, evidence that a stow was "dangerous" and "very, very poor[]" was held to be sufficient to support a jury finding of negligence; we did not require that the record contain testimony, almost of a talismanic quality, that the stow be "unreasonably" dangerous or that the cargo could not be discharged with "reasonable" safety. We similarly refuse to do so here.

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10. We acknowledge that unloading the Houston pipe first would have involved considerable expense to the time charterer, but that fact does not change our conclusion. There is some evidence that the time charterer originally intended to have the ship dock in Houston and discharge the Houston pipe before going to New Orleans, but that, while the ship was at sea, the charterer instructed the vessel to proceed first to New Orleans. Had the vessel gone to Houston first as planned, there would be no question but that the stow would have been reasonable; but once the decision was made to discharge the New Orleans pipe first, the defendants were under a duty to reevaluate the condition of the stow and determine what steps, if any, needed to be undertaken to ensure a reasonably safe discharge.

Whether a stowage method is reasonable depends upon a myriad of factors, including the absolute and relative danger which it presents *vis-a-vis* other stowage methods, and the feasibility of such other methods. In essence, the question is how a reasonable vessel interest exercising due care would allow the cargo to be stowed, and what it would conclude about its stowage methods. The evidence in this case is sufficient for a reasonable jury to conclude that a reasonable vessel interest would not permit the cargo to be stowed in this manner because of the danger to property and life which the stow would present.

The defendants' second argument is similarly without merit. They do not and cannot deny that they were aware of the overlapping condition of the cargo; the record establishes beyond doubt that the owner/operator knew in Brazil that the cargo was being stowed in an overlapping fashion and that the overlap continued to exist when discharge operations began in New Orleans.[11] *Cf. Lemon*, 656 F.2d at 116. Their contention is only that they did not have actual knowledge of the danger which this condition presented such that liability may attach under *Scindia*.

But the defendants misread *Scindia*. Under the first *Scindia* duty, there is no requirement that the vessel have actual knowledge of the danger presented before liability will attach. Rather, that duty speaks only in terms of a failure to exercise due care (although we measure its duty with regard to, not the ordinary stevedore, but an "expert and experienced" stevedore exercising "reasonable care"). The law of negligence has never required that a tortfeasor actually be aware of the risks which its actions create

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11. To the extent that the time charterer can be charged with at least part of the responsibility for the manner in which the pipe cargo was loaded in Brazil, see infra Part III.B, its liability can be justified along the same lines as for the owner/operator. See Kerr-McGee, 830 F.2d at 1341 ("Certainly the time-charterer has some responsibilities. It designates the cargo that the chartered vessel will carry, and if, for example, it carelessly chooses an unsafe combination of cargo to share the same hold, it could be liable for resulting damages. The time-charterer directs where and when the vessel will travel . . . .").

before it may be held liable,[12] and *Scindia* does not add such a requirement in this context. *See Harris*, 730 F.2d at 299 (defendants may be liable under the first duty "[in] situations where the [defendants] knew or should have known of the dangerous condition") (emphasis added). All that is required is that the injury that results from the failure to exercise due care be reasonably foreseeable--and in this case a reasonable owner/operator and time charterer would have perceived the dangers presented by the overlapping condition of the cargo.

2.

The defendants also contend that the evidence is insufficient to support a finding of liability on the theory that the gap in the pipe cargo into which Woods fell was a "hidden danger" such that the defendants were obligated to warn Woods of its existence. We agree that this theory of liability should not have been submitted to the jury.

An owner/operator is charged with the duty of warning the stevedore and longshoremen about

> any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known to the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Scindia, 451 U.S. at 167, 101 S.Ct. at 1622. The undisputed testimony in this case is that the existence of gaps in loosely-stowed pipe is a common phenomenon and, even if not discovered or created until discharge operations began, was open and

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12. See W. Keeton, Prosser Keeton on the Law of Torts § 31 at 169 (5th ed. 1984).

obvious to Woods, his fellow longshoremen, and anybody who looked into the hold.

The "failure" of the defendants to inform Woods of such an obvious condition cannot serve as a basis for liability. *See Morris v. Compagnie Maritime des Chargeurs Reunis, S.A.*, 832 F.2d 67, 69-71 (5th Cir.1987), *cert. denied*, U.S. , 108 S.Ct. 1576, 99 L.Ed.2d 891 (1988).[13] The "hidden danger" theory of liability thus should not have been submitted.

3.

Finally, the defendants claim that the evidence was insufficient to support a jury finding that they breached the third *Scindia* duty, which requires a shipowner to intervene in stevedoring operations if it has (1) actual knowledge of a dangerous condition that develops during the course of those operations and (2) actual knowledge that the stevedore has failed to remedy it. *See Helaire*, 709 F.2d at 1038-39. Although we have serious doubts as to

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13. *Morris* indicates that even an "open and obvious" hazard may nonetheless serve as a basis for liability if the stevedore has no alternative to exposing himself to the danger other than leaving his job or facing criticism for delaying work. See 832 F.2d at 70. This theory--that the vessel cannot defeat liability by asserting that the stevedore has exposed himself to an open and obvious hazard created by the vessel, unless the evidence shows that the stevedore decided to forego reasonable alternatives to exposing himself to the hazardous condition--runs throughout our discussions of a vessel's duties under *Scindia*. *See Teply v. Mobil Oil Corp.*, 859 F.2d 375, 378 (5th Cir.1988); *Stass v. American Commercial Lines, Inc.*, 720 F.2d 879, 882 (5th Cir.1983). In such circumstances, however, liability is more properly based, not upon the hidden danger" theory, but upon the theory, described *supra*, that the defendant has failed to exercise due care to provide the stevedore with a reasonably safe workplace. The danger is no longer "hidden" in any sense of the word, but may nonetheless serve as a basis for liability if the vessel has a responsibility to prevent its creation or correct it once it exists. *See Lemon*, 656 F.2d at 116; *Teply*, 859 F.2d at 378; *Spence v. Mariehamns R/S*, 766 F.2d 1504, 1507 (11th Cir.1985).

whether the third *Scindia* duty is even applicable to this case,[14]

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14. In *Harris*, we distinguished the two relevant *Scindia* duties along the following lines:

> *Scindia* was primarily concerned with a dangerous condition that develops within the confines of cargo operations after the stevedore takes control. The Court noted that a stevedore then becomes primarily responsible for the safety of the longshoreman and 'the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of cargo operations that are assigned to the stevedore.' . . . The Court reasoned that liability would fall on the shipowner only if he knew of the later-developed danger and also knew that the stevedore was not taking steps to cure it.
>
> *Scindia* also described the more general aspects of a shipowner's duty to longshoremen. Thus, the shipowner must exercise care to deliver to the stevedore a safe ship with respect to 'the ship's gear, equipment, tools, and work space to be used in the stevedoring operations.'

730 F.2d at 298-99 (quoting *Scindia*, 451 U.S. at 167, 172, 101 S.Ct. at 1622, 1624) (citations omitted, emphasis in original). Accordingly, we explicitly stated in *Harris* that a shipowner's actions regarding the improper stowage of cargo--a condition that comes into existence before the discharging stevedore assumes control of cargo operations--are not to be judged by reference to the third *Scindia* duty:

> The jury in *Lemon* found that the shipowner breached a duty to exercise reasonable care in failing to provide a reasonably safe place to work . . . . We were not concerned in *Lemon*, nor are we concerned here, with dangerous conditions that develop only after control of the ship has been given to the stevedore.

Id., at 299.

Under the law of this circuit, therefore, the jury should not have been charged on the third *Scindia* duty. Because the defendants, preferring to concede that the third duty applied and to argue that the evidence was insufficient to support a finding that it had been breached, did not raise this issue in their motions for directed verdict and j.n.o.v., we cannot find error on this ground. See Fed.R.Civ.P. 50(a) ("A motion for directed verdict shall state the specific grounds therefor."); *Dimmitt Agri Industries, Inc. v. CPC Int'l Inc.*, 679 F.2d 516, 521 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082, 103 S.Ct. 1770, 76 L.Ed.2d 344 (1983); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 846 (5th Cir. 1975), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976); *House of Koscot Dev. Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64,

the defendants do not challenge the jury's finding on this ground; rather, they contend that there was no evidence to support a jury finding that they had actual knowledge of the hazard created by the overlapping condition of the cargo. We agree.

In instructing the jury on the third *Scindia* duty, the district court stated that the defendants could be found to have been negligent only if, *inter alia*, they "had actual knowledge that the condition would pose an unreasonable risk of harm to the longshoremen working on board the ship." Neither party objected to this instruction.

A review of the record convinces us that no reasonable jury could find that the defendants had actual knowledge that the overlapping condition of the cargo posed an unreasonable risk of harm to Woods and his fellow longshoremen.[15] There is ample evidence that the defendants were aware of the overlapping condition of the cargo; conversely, there is no evidence that the defendants were actually aware that an "unreasonable risk of harm" was thereby created. The only evidence that might possibly support such a conclusion is testimony that the foreman of Woods's crew told one of the ship's officers that the pipe would have to be discharged "slowly" because of the overlap; standing by itself, that statement falls well short of putting the vessel inter-

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67-68 (5th Cir. 1972).

15. It is important to contrast this requirement under the third *Scindia* duty with the requirements of the first *Scindia* duty. Under the first duty, all that is required is that the shipowner "knew or should have known," *see Harris*, 730 F.2d at 299, of the dangerous condition; actual knowledge of the condition or the resulting hazard is not required. Under the third *Scindia* duty, however, such actual knowledge of the hazard is required. Thus, it is entirely possible to conclude that the defendants breached the first *Scindia* duty on the theory that they should have known that the overlapping condition was unreasonably hazardous while also concluding that no breach of the third *Scindia* duty occurred because the defendants lacked actual knowledge.

ests on notice that the overlap created an unreasonable risk of harm to the longshoremen. In short, the Woodses failed to pierce the defendants' claims of blissful ignorance of the danger presented by the stow; no reasonable jury could therefore have found, in accordance with its instructions, that the defendants breached the third *Scindia* duty.

D.

Having thus found that the district court erred in submitting two of the Woodses' three theories of liability to the jury, we have little choice but to vacate the judgment and remand for a new trial. Although the "hidden danger" theory played only a minor role at trial, the issue of the defendants' liability under the third *Scindia* duty was strenuously litigated by both sides, and occupies a major portion of the court's instructions to the jury. Moreover, because both the elements of the third *Scindia* duty and the actions to which it applies are different from those encompassed by the first duty, we cannot feel confident that the jury's finding of liability was based solely upon the first duty, or that a jury that found a breach of the third duty would necessarily find a breach of the first. Because we do not feel "reasonably certain" that the jury's verdict was not influenced by the erroneously-submitted second and third theories of liability, we remand for a new trial.

III.

In addition to their sufficiency arguments, the defendants have raised everal other issues on appeal. As to certain of these issues--relating to jury instructions and the division of liability between the defendants--it is likely that the district court will have to confront them again on remand. Lest the court's rulings on these issues be the subject of appeal after the new trial, and therefore grounds for reversal and yet another new trial, we address these issues now to provide guidance for the district court in its future conduct of the case.

A.

The defendants contend that the district court erred by denying their request that the jury be instructed that a vessel owner

> may reasonably rely on a stevedore's judgment that a condition, though dangerous, is safe enough for the longshoremen to work without injury. Thus, even if the plaintiff could establish that the vessel owner had knowledge [of the dangerous condition], the vessel owner still would be entitled to rely on the stevedore's judgment that the condition presented, though dangerous, was safe enough for the longshoremen to work.

The defendants contend that the requested instruction correctly states the law in this circuit as set forth in *Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1039 n. 12 (5th Cir. 1983). We disagree.

Just as the trial court is obligated to instruct the jury on the law underlying the plaintiff's theory of recovery, it must do so as to defensive theories as well. *See Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 425 (5th Cir.1985). The defendant's proffered instruction, however, must be legally correct and supported by the evidence; moreover, the court may refuse to give such instruction if the instructions that it does give cover the theory in substance, as it is the court and not the parties that has control over the language and form of the instructions. *See id.* at 425 n. 10.

In this case, we agree with the district court's conclusion that the requested instruction "misstate[s the law] so badly that it's almost scary." *Helaire* stands for the eminently sensible proposition that, in determining whether an owner/operator or time charterer has fulfilled its section 905(b) duties, the jury may consider the reasonableness of the stevedore's judgment in determining whether the vessel interests have acted reasonably:

> The opinion in *Scindia* recognized that the owner's actual knowledge of a dangerous condition which later injured a longshoreman might not in itself make him negligent. It might well be 'reasonable' for the owner to rely on the stevedore's judgment that the condition, though dangerous, was safe enough.

709 F.2d at 1039 n. 12 (citing *Scindia*, 451 U.S. at 175, 101 S.Ct. at 1626). *Scindia* makes it plain, however, that there are circumstances in which a stevedore's judgment will be so "improvident" that the owner/operator, if it has the requisite actual knowledge of the situation, is required to overrule the stevedore's judgment and take steps to correct a hazard. Similarly, it is the acknowledged rule in this circuit that a stevedore's decision to proceed in the face of an open and obvious hazard will not automatically immunize a defendant from section 905(b) liability.[16]

The requested instruction, by advising the jury that the defendants "would be entitled to rely" upon the stevedore's judgment, does not acknowledge these exceptions. The district court, which properly instructed the jury that "[a]s a general matter, the ship owner/operator and the charterers may rely on the stevedore to avoid exposing longshoremen to unreasonable hazards," correctly rejected the request to charge the jury on the defendants' view of the law.

B.

The time charterer also challenges the district court's refusal

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16. *See, e.g., Barrios v. Pelham Marine, Inc.*, 796 F.2d 128, 132 (5th Cir.1986) ("Although in some circumstances '[i]t might well be "reasonable" for the [ship] owner to rely on the stevedore's judgment that the condition, though dangerous, was safe enough,' *Helaire*, 709 F.2d at 1039 n. 12, it was not reasonable in this case for [the ship owner] to rely on [the stevedore's] judgment that the condition was adequately safe.").

to instruct the jury (1) that the time charterer could be at fault only to the extent that it exercised actual supervision or control over the loading operations in Brazil, (2) that the party that prepared the stowage plan and the loading stevedores were independent contractors, and (3) that the time charterer bore no duty to supervise the actions of the independent contractors and was not responsible for their negligent acts unless the jury found that the time charterer "directly" controlled and supervised their actions. We find no error in the court's decision not so to charge the jury.

Again, we review the court's decision under the standards of review set forth in *Pierce*. The first requested instruction plainly misstates the Woodses' theories of liability against the time charterer by completely ignoring the theory that the time charterer's responsibilities included taking corrective actions--in the form of instructing or authorizing the stevedore to unload the overlapping Houston pipe before it discharged the New Orleans pipe--once the pipe cargo was improperly stowed in Brazil. The requested instruction is thus incorrect when it states that the time charterer could be at fault "only to the extent that it exercised actual supervision or control over the loading operations."

The court's refusal to give the time charterer's second and third requested instructions was also proper. A party is entitled to have the jury charged on a defensive theory only if the theory is supported by the evidence. *See Pierce*, 753 F.2d at 425. Although we have consistently held that "a principal . . . who hires independent contractors over which he exercises no operational control has no duty to discover and remedy hazards created by its independent contractors," *Wallace v. Oceaneering Int'l*, 727 F.2d 427, 437 (5th Cir.1984), the record in this case reveals that the time charterer did exercise substantial control over the actions of its representatives in Brazil.

There was substantial communication between Borda Livre (the time charterer's alleged "independent contractor" in Brazil who prepared the cargo plan, inspected the cargo, and mediated between the time charterer's representatives, the loading steve-

dores, and the time charterer) and the time charterer itself. These communications included instructions from the time charterer that Borda Livre arrange certain cargoes in a certain manner to facilitate discharge. Thus, even if Borda Livre and the loading stevedores are considered independent contractors, the evidence establishes that the time charterer had the theoretical and practical ability to control their actions and actively did so on at least one occasion. The district court did not err by refusing to give the requested instructions.

IV.

After the jury rendered its answers to interrogatories on the issues of liability and damages, the district court proceeded to consider each defendant's claim that it was entitled to indemnity from the other defendant; the court also considered the allocation of responsibility for the percentage of fault ascribed to the stevedore, Cooper/T. Smith. The district court denied both the owner/operator's and the time charterer's claims for indemnity and allocated the stevedore's percentage of fault between the two defendants according to their own respective percentages of fault. The court was correct in so doing.

A.

In essence, the quarrel between the two defendants with regard to the in demnity issue is over who should be held responsible for the failure of the loading stevedore in Brazil to stow the pipe cargo so that it could be unloaded with reason able safety. The time charterer argues that the terms of the charter party require a conclusion that at all times the owner/operator retained operational control over cargo operations, thus contractually precluding any imposition of liability upon the time charterer. Although we agree with the time charterer's interpretation of the charter party, we also agree with the district court that, going beyond the terms of the charter party, the time charterer did exercise some degree of operational control over cargo operations and thus can be held responsible for its own negligence.

The charter of the vessel was on a New York Produce Exchange (Government Form) Time Charter, a commonly-used document in the industry. Clause 8 of the time charter provides in pertinent part as follows:

> The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency, and Charterers are to load, stow, and trim, and discharge the cargo at their expense under the supervision of the Captain . . . .

The time charterer, relying upon our opinion in *D/S Ove Skou v. Hebert*, 365 F.2d 341 (5th Cir.1966), *cert. denied*, 400 U.S. 902, 91 S.Ct. 139, 27 L.Ed.2d 139 (1970), contends that this contractual provision leaves operational control over cargo operations in the owner/operator, thus making it solely responsible for any injuries resulting from the manner in which the cargo was stowed.

In *Ove Skou*, a shipowner held liable for a longshoreman's injuries resulting from the loading stevedore's negligence in securing a hatch sought indemnity from the time charterer under the theory that, by an extension of *Ryan Stevedoring Co. v. Pan-Atl. S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), the time charterer impliedly warranted that the loading stevedore would perform its job in a workmanlike manner. See 365 F.2d at 351. We rejected the shipowner's argument, holding that no such warranty existed.

Essential to our holding was the conclusion that the provision from the charter party quoted above does not shift operational control over cargo operations, and therefore responsibility for the actions of independent stevedores, from the shipowner to the time charterer:

> [C]lause [8], specifying that the captain shall be under the orders of the Charterers 'as regards employment and agency' and that 'charterers are to load, stow, and trim the cargo' does not give to Time Charterer any operational control over

> these activities. Rather, these charter party provisions are essentially a specification of the party--owner or charterer--upon whom the ultimate financial cost rests for any one or more of the activities.
>
> . . . In the absence of circumstances which would give rise to a liability for actions taken by an independent contractor--none of which are present here--Time Charterer had no responsibility to Shipowner or to third persons including longshoremen for acts of omission or commission by the stevedores.

Id. (footnote omitted).[17] Thus, considering solely the issue of the contractual allocation of responsibility between the parties, Ove Skou compels the conclusion that, absent evidence to the contrary, the time charterer bears no responsibility to the owner/operator or third parties for the negligent acts of the loading stevedore.[18]

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17. See also *Mallard v. Aluminum Co. of Canada*, 634 F.2d 236, 242 n. 5 (5th Cir. Jan. 1981), *cert. denied*, 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85 (1981). There, we reasoned as follows:

> [*Ove Skou*] . . . holds that . . . clause [8] makes a charterer responsible for the costs of cargo handling, but in and of itself does not transfer operational responsibility from the owner. . . . In light of *Skou*, this circuit seems reluctant to find any shift of operational responsibility for personal injuries to the time charterer absent clear language to that effect.

18. The owner/operator's attempts to distinguish *Ove Skou* or otherwise to convince us that the case has not survived the ravages of time are to no avail. The force of *Ove Skou's* reasoning--that the contractual language "in and of itself," *Mallard, id.*, does not shift any operational control from the shipowner to the time charterer--has not been vitiated by the fact that the shipowner can no longer seek indemnity from the negligent stevedore, by the fact that the case may have been based upon an unseaworthiness rather than a negligence standard, or by the fact that the accident in that case arguably involved the ship's gear rather than its cargo. The *Ove Skou* court's interpretation of the contractual language did not turn upon--indeed, did not even mention--these facts; rather, it

Unfortunately for the time charterer in this case, however, there is evidence that, notwithstanding the contractual allocation of operational control over, and attendant responsibility for, cargo operations, it did have some degree of operational control over the loading operation. As noted above, there were extensive communications between the time charterer and its representatives in Brazil regarding the cargo and the manner in which it was

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...Continued...

looked solely to the language of the contract. None of the numerous changes in the law since the time of that decision convinces us that our reasoning is no longer valid. Despite the fact that other circuits have seen fit to reject *Ove Skou* and hold that the charter party does shift operational control over cargo operations to the time charterer, *see Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1305-6 (9th Cir. 1981), *cert. denied*, 459 U.S. 967, 103 S.Ct. 294, 74 L.Ed.2d 278 (1982); *Fernandez v. Chios Shipping Co., Ltd.*, 542 F.2d 145, 151-53 (2d Cir. 1976), both the holding and reasoning of *Ove Skou* are alive and well in this circuit, and with good reason.

The owner/operator also argues that the rule of *Ove Skou* has been altered by some of our later opinions and that the owner/operator should be entitled to indemnity from the time charterer because the ship's master is, by contract, the time charterer's agent during cargo operations. The cases to which the owner/operator refers us hold that clause 8 may be read as providing that the captain's decisions regarding the "safety of the cargo, as opposed to cargo-related decisions going to the seaworthiness and safety of the vessel, are made on behalf of the time charterer, with the charterer therefore assuming responsibility for them. *See Nitram, Inc. v. Cretan Life*, 599 F.2d 1359, 1366 (5th Cir. 1979); *Horn v. Cia de Navegacion Fruco, S.A.*, 404 F.2d 422, 433 (5th Cir. 1968), *cert. denied*, 394 U.S. 943, 89 S.Ct. 1272, 22 L.Ed. 2d 477 (1969).

Both of these cases, however, involved questions regarding responsibility for damage to the cargo rather than for injuries to persons covered by the LHWCA, and neither case cites *Ove Skou*. It is entirely possible to reconcile the two lines of cases by stating that, although clause 8 leaves complete operational control over cargo operations in the shipowner, the time charterer nonetheless has assumed responsibility for some portion of the shipowner's decision--but only that specified by contract. In any event, to the extent that the two sets of cases are arguably inconsistent, *Ove Skou*, being the earlier decision, is controlling in this case. *See United States v. Edelman*, 873 F.2d 791 (5th Cir. May 15, 1989) (*per curiam*).

to be loaded. The time charterer's instructions regarding the cargo, and its decision to go to New Orleans first instead of Houston, despite the fact that the cargo was loaded with a different itinerary in mind, indicate that the time charterer did not just pay the bills for cargo operations that took place beyond its control.

Although clause 8 in the charter party may preclude visiting liability upon the time charterer for the owner/operator's negligence, it does not preclude holding the time charterer liable for its own negligent acts or for the negligent acts of parties in Brazil over whom it exercised control. In deed, this is precisely the case contemplated in *Ove Skou*, in which we stated that there may be "circumstances which would give rise to a liability for actions taken by an independent contractor." 365 F.2d at 351. See also *Kerr-McGee Corp. v. Ma-Ju Marine Servs., Inc.*, 830 F.2d 1332, 1342 (5th Cir.1987). Because the jury found the time charterer itself to be negligent, it is not entitled to indemnity from the owner/operator.

Nor is the owner/operator entitled to indemnity from the time charterer. As noted above, clause 8 does not make the ship's master or other members of its crew the time charterer's agents with respect to all of their decisions, regarding the cargo, made during cargo operations. Each party exercised some control over cargo operations and could have acted to ensure that the cargo was loaded in such a manner that cargo operations would proceed with reasonable safety. Each such party therefore was charged with a duty to third parties regarding the manner in which the cargo was stowed. Because they have not, by contract, shifted their responsibility for the manner in which those duties were exercised, neither party is entitled to indemnity from the other.

B.

Each defendant contends that the other defendant should be solely responsible for Cooper/T. Smith's negligence. The time charterer argues that the owner/operator should be solely liable because only it was in a position to prevent Cooper/T. Smith

from performing its functions negligently. Conversely, the owner/operator contends that the time charterer should be responsible because it was the party that hired Cooper/T. Smith.

Notwithstanding the defendants' competing arguments, we find no error in the court's *pro rata* allocation of the stevedore's fault between the two defendants. Both parties were found to be liable in this case, not only because they were responsible for the events that led to the cargo's reaching New Orleans in the condition it did, but because they failed to take corrective action once the cargo arrived there. Neither party disputes its power, had it chosen to exercise the same, to direct Cooper/T. Smith's actions in unloading the cargo. Both parties, through their actions and their failures to act, set the stage for the accident, even if that event required the negligence of another party to appear on the scene before it could occur. Allocation of the fault between them on a *pro rata* basis is thus entirely reasonable.

V.

Because the jury should not have been charged on two of the Woodses' three theories of liability, we VACATE the judgment of the district court and REMAND for a new trial.

William Derr, Appellant v. Kawasaki Kisen K.K.;
Thomas Robertson, Appellant v. Tokai Shosen K.K.

Nos. 86-1772, 87-1031

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

835 F.2d 490 (Dec. 15, 1987)

Before: SLOVITER and STAPLETON, Circuit Judges, and FISHER, District Judge *

* Hon. Clarkson S. Fisher, United States District Court for the District of New Jersey, sitting by designation.

SLOVITER, Circuit Judge.

In 1972, Congress amended the Longshoremen's and Harbor Workers' Compensation Act (the Act) to eliminate any liability of a vessel for injuries to longshoremen during cargo operations unless caused by the negligence of the vessel. This case presents, for the first time in this court since the Supreme Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), the issue of what liability, if any, a vessel has for injuries to longshoremen caused by cargo improperly loaded by a foreign stevedore.

I.

Background

Appellants William Derr and Thomas Robertson were longshoremen injured in separate but similar accidents in which cargo fell upon them during the unloading of the respective appellees' vessels. Derr, who was discharging packages of lumber, was injured when a package fell and struck his foot. Robertson was injured when a coil of steel rod fell from the stow, striking him on the head and back. In both cases, the cargo had been loaded

by independent stevedores in foreign ports. Derr and Robertson were employed by independent stevedores responsible for the discharge of the cargo. The longshoremen filed suits in federal court alleging that the shipowners were liable under section 5(b) of the Act, 33 U.S.C. § 905(b) (1982 & Supp. II 1984), on the ground that their injuries were caused by the vessels' negligence.

Each case was tried to a jury. The juries heard testimony suggesting that the ships had encountered bad weather during passage. In *Derr*, it was stated that the cargo had shifted during the voyage, meaning that considerable movement of cargo had occurred. In *Robertson*, there was testimony that there "may have been some movement but not what we [in the shipping business] call shifting," which is more serious. App. at 166-67. The appellants' expert witness testified that the cargo would probably not have moved or shifted had it been properly secured by the foreign longshoremen.

Derr testified that he was aware of the shift in the cargo prior to the accident, and Robertson presented evidence that the movement of the wire coils was apparent. Both plaintiffs stated that it was not unusual to encounter shifted cargo.

The district court in each case granted a directed verdict for the vessel, holding that under the Supreme Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), the vessel had no duty to inspect or supervise the handling of cargo, and no duty to warn of a dangerous cargo condition which is open and obvious or of which it is unaware. *Derr v. Kawasaki Kisen K.K.*, No. 85-5250, bench op., App. at 106-09 (E.D. Pa. Dec. 2, 1986); *Robertson v. Tokai Shosen K.K.*, 655 F. Supp. 152, 154-55 (E.D. Pa. 1987). The cases having been consolidated for purposes of appeal, Derr and Robertson contend that the district courts erred as a matter of law.

II.

The Legislative Scheme and Scindia

Until 1972, a tortured liability triangle was played out on the wharves and piers of America. A longshoreman injured in a cargo operation could receive compensation from the stevedore employer, and also prevail in an action against the vessel on either a negligence or breach of the warranty of seaworthiness theory. To show unseaworthiness, the longshoreman had only to prove that there was an unsafe, injurious condition on the vessel; the fact that the condition was the fault of the stevedore did not protect the vessel, although the vessel might in turn recover from the stevedore for breach of warranty to handle the cargo operation safely. *Scindia*, 451 U.S. at 164-65.

As Judge Friendly pointed out in *Kakavas v. Flota Oceanica Brasileira, S.A.*, 789 F.2d 112, 117 (2d Cir.), *cert. denied*, 107 S. Ct. 186 (1986), this liability scheme produced "an anomalous and intolerable situation." A considerable part of the longshoreman's award ended up in the hands of his lawyer with much of the remainder going to the stevedore's insurers in repayment of the workmen's compensation received. That compensation was inadequate, and the stevedore, instead of being exposed only to the workmen's compensation award, ended up paying the awards made against the ship as well. The system served neither deterrence nor compensation very well. H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News. 4698, 4702-03 (House Report). *See generally* Note, *Shipowners Owe Longshoremen No Duty to Discover Dangers Arising Within the Confines of the Cargo Operation*, 56 Tul. L. Rev. 1421, 1422-27 (1982) (hereinafter *Tulane Note*).

Congress "radically changed this scheme of things," *Scindia*, 451 U.S. at 165, by amending the Act in 1972 to increase the longshoremen's workmen's compensation, *see* House Report at 4700-01, and by adding subsection (b) to section 5 of the Act. That subsection provides, in pertinent part:

> In the event of injury to a [longshoreman] caused by the negligence of a vessel, then such [longshoreman] . . . may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer [the stevedore] shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

33 U.S.C. § 905(b).

The intention of Congress to eliminate the vessel's liability without fault was express and unambiguous. Congress believed that it was fairer, and fully consistent with the goal of promoting safety, for the vessel's liability

> to be predicated on negligence, rather than the no-fault concept of seaworthiness. . .
>
> The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "nondelegable duty", or the like.

House Report at 4703.

Congress was less clear in defining the vessel's statutory negligence and its resulting liability. "Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation -- just as they are in cases involving alleged negligence by land-based third parties." *Id.* at 4704. This was the task the Supreme Court took up in *Scindia*.

Scindia involved a longshoreman who was injured in an unloading operation as the result of a defective winch that was part of the vessel's equipment being operated by the stevedore. In its opinion, the Court defined the line between the responsibilities of the stevedore and of the vessel. The vessel has a duty with respect to the general condition of the ship's gear, equipment, tools, and work space, and a duty to warn the stevedore of hidden dangers which are or should be known to the vessel in the exercise of reasonable care, and that are not known or obvious to the stevedore. *Id.* at 167. Also, if the vessel actively involves itself in the cargo operation, or fails to exercise due care in protecting longshoremen from dangers they might encounter from equipment under vessel's active control, it would be negligent. *Id.* However, with respect to cargo not loaded by or under the active supervision of the vessel, the Court explained that the vessel could rely on the expertise of the stevedore. *Id* at 170-71; *see, e.g., Kakavas*, 789 F.2d at 118 ("The basic theme of the *Scindia* opinion is the extensive reliance that a shipowner may justifiably place on an independent contractor.").

The stevedore, in turn, who is in the best position to avoid accidents during the cargo operation, has a statutory duty to provide for the safety of longshoremen under 33 U.S.C. § 941 (1982) and warrants to the vessel that he will perform competently. *Scindia*, 451 U.S. at 170-71. On this basis, the Court stated that "absent contract provision, positive law, or custom to the contrary . . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." *Id.* at 172. Against this background, we consider the alleged negligence of the vessels in this case.

III.

Discussion

Scindia was, of course, a case in which the longshoreman's injury resulted from the malfunctioning of the ship's gear being

used in the cargo operations. The Court held that there was a triable issue as to whether the shipowner knew of the defect or was chargeable with such knowledge. *Scindia*, 451 U.S. at 178. Appellants here argue that nothing in *Scindia* supports the distinction made by the district courts in *Derr* and *Robertson* between unsafe conditions resulting from the manner in which cargo is stowed and other types of unsafe conditions. This argument is contrary to the Court's analysis in *Scindia*, and we reject it. We read the Court's opinion in *Scindia*, giving effect to Congress' intent "to terminate [the vessel's] automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore," *id.* at 168, as limiting the vessel's potential liability for injuries caused by faulty stowage of cargo to certain narrow circumstances.

A.

No Duty to Inspect and Supervise

Scindia compels the holding that the shipowner has no duty to supervise or inspect cargo loaded or unloaded by stevedores and therefore may not be held liable for injuries arising out the stevedore's failure to perform his job properly.[1] *Scindia* recognizes that the general rule that vessels have no duty to supervise or inspect cargo operations may not apply where there is "contract provision, positive law, or custom to the contrary." *Scindia*, 451 U.S. at 172. No evidence was presented to trigger this exception in the *Robertson* trial, but Derr called Captain Bernard Oudijk, an expert witness, who testified that it was customary in maritime industry for vessels to observe the loading of cargo. The district court apparently rejected this testimony as a matter of law, believing it to be merely an attempt to restate as a custom the general

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1. To the extent that *Di Rago v. American Export Lines, Inc.*, 636 F.2d 860 (3d Cir. 1981), predicated liability on a vessel's duty to inspect or supervise the loading stevedore's cargo operation, it is no longer binding precedent in light of the subsequent decision in *Scindia*.

duty to inspect cargo rejected in *Scindia*.

Even if it were true that a vessel customarily observes the loading of cargo, understandable in light of its potential liability for certain damage to cargo, *see Tulane Note*, supra at 1433, we agree with the district courts that such observation cannot be used to reimpose the general duty to supervise the stevedore. Nor can such observation be vaulted into the type of active involvement and control that would trigger the ship's liability. *Cf. Gill v. Hango Ship-Owners/AB*, 682 F.2d 1070, 1072 n.1 (4th Cir. 1982) (referring to dangerous "packing of the rolls [of paper] by the shipowner in a foreign port"); *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 299 n.2 (5th Cir. 1984) (no evidence that vessel used independent stevedore to load cargo).

In a similar effort, the appellants urge this court to revive the duty of supervision by adopting an excessively narrow reading of *Scindia*. Appellants would have it that, while there is no duty to supervise the work of a stevedore "to discover dangerous conditions that develop within the confines of the cargo operations," *Scindia*, 451 U.S. at 172 (emphasis supplied by appellants), the vessel does have a duty to inspect the cargo before cargo operations begin and therefore "*is charged with knowledge of*, conditions which exist at the start of cargo operations." Appellants' Brief at 31.

It is true that some courts of appeals have read the law in a manner compatible with appellants' arguments. The *Scindia* rejection of a duty to inspect or supervise cargo operations has been taken to apply only once the stevedore has commenced work, allowing the inference of a stricter duty including an obligation to inspect cargo already loaded before turning the hold over to the off-loading stevedore. *See, e.g., Stass v. American Commercial Lines, Inc.*, 720 F.2d 879, 882 (5th Cir. 1983); *Clark v. Bothelho Shipping Corp.*, 784 F.2d 1563, 1565 (11th Cir. 1986); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 535 (5th Cir. 1986).

The district court in *Robertson* thought this reading would

"eviscerate" *Scindia* and the Act: "while the vessel would not be required to supervise and inspect each stevedoring operation . . . it would be held to such a requirement at each subsequent port which encountered the condition of the stow. This makes no sense, and would render the principle of fault-based liability of the vessel a nullity." *Robertson*, 655 F. Supp. at 155; accord *Scindia*, 451 U.S. at 168-69 (inconsistent with Act to hold vessel has "continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process"). We agree.

Derr and Robertson suggest that although *Scindia* signifies that the vessel may not be liable for the negligence of the American stevedore employer, the shipowner may be held liable for unsafe conditions created by improper stowage by a foreign loading stevedore. They rely chiefly on the decision in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982).

The *Turner* court believed that the safety of longshoremen was furthered by making the vessel responsible for cargo loaded by foreign stevedores because, "[a]s between the vessel and the [American] stevedore-employer, the vessel is the only one in a position to ensure the safety of the longshoremen." *Id.* at 1304. Because the offloading stevedore has no control over the foreign stevedore, the vessel can ensure safety "by choosing a reliable foreign stevedore, supervising its work when necessary, and warning the offloading stevedore of concealed dangerous conditions created by the foreign stevedore." *Id.*

We cannot accept the *Turner* analysis. As *Scindia* makes clear, the 1972 amendments are grounded in the belief that stevedores are primarily responsible for the stowage of cargo. 451 U.S. at 170-72; *cf. Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861, 862 (2d Cir. 1977) (finding vessel had no duty of care with respect to foreign-loaded cargo in light of congressional intention to "relieve shipowners of liability predicated upon the negligence of stevedoring companies"). As this court has pointed out before, "creation of a shipowner's duty to oversee the stevedore's activity

and insure the safety of the longshoremen would . . . saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b)." *Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1249-50 n.35 (3d Cir.), *quoted with approval in Scindia*, 451 U.S. at 169, *cert. denied*, 434 U.S. 861 (1977).[2]

Thus the real issue is not where the cargo was loaded, but whether a vessel may be held negligent for failure to inspect or supervise the stowage of cargo. The scheme carefully drawn by Congress and interpreted in *Scindia* does not change because the cargo stowage was performed by foreign stevedores. *See, e.g., Spence v. Mariehamns R/S*, 766 F.2d 1504 (11th Cir. 1985) (making no distinction between duty of vessel to inspect foreign and domestically-loaded cargo). It follows that the district courts did not err in declining to increase the duty on the vessel with respect to cargo because it was loaded by foreign stevedores.

B.

Duty for Ship and Equipment

Before the 1972 amendments and the *Scindia* decision, the Supreme Court has recognized that the vessel owes to the stevedore and longshoreman "the duty of exercising due care 'under the circumstances,'" *Scindia*, 451 U.S. at 166 (quoting *Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404, 415 (1969)). In *Scindia*, the Court defined the vessel's duty with respect to the ship and equipment thus:

> to exercis[e] ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of

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2. *Turner* is also distinguishable from the cases here insofar as the danger in that case was concealed. In dictum, the decision has been limited to that situation by the Ninth Circuit Court of Appeals. See *Taylor v. Moran Agencies*, 739 F.2d 1384, 1387 (9th Cir. 1984).

> reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warn[] the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Id. at 167; see also *id.* at 172; id. at 180 (Powell, J., concurring).

Thus, we have imposed liability on the ship for injuries resulting from a defect in the hatch covers, *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116 (3d Cir. 1979), *vacated sub nom. American Commercial Lines, Inc. v. Griffith*, 451 U.S. 965, *on remand*, 657 F.2d 25 (1981), *cert. denied*, 456 U.S. 914 (1982), and from a defective gangway which, albeit supplied by the stevedore, became the vessel's gangway, *Sarauw v. Oceanic Navigation Corp.*, 622 F.2d 1168 (3d Cir. 1980), *vacated*, 451 U.S. 966, *on remand*, 655 F.2d 526 (1981), *cert. denied*, 456 U.S. 914 (1982).

Appellants do not contend that either of the vessels in this case was defective, or that their equipment, gear, or tools suffered from any defect. Appellants have stressed that the Supreme Court referred to "work space" when it spoke of the ship's duty extending "to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations." *Scindia*, 451 U.S. at 167. We construe that language to refer to the physical work space. The Court could not have intended by this reference to establish a duty by the ship with respect to cargo that it had expressly negated in other portions of the opinion. Thus, there was no basis in either of these cases for the jury to have found negligence by the ships on the basis of any defective equipment or gear.

C.

Duty to Intervene

The parameters of the vessel's duty to intervene in cargo operations were not fully drawn in *Scindia*. The only discussion in that opinion related to the shipowner's "duty to act where the danger to longshoremen arises from the malfunctioning of the ship's gear being used in the cargo operations." *Scindia*, 451 U.S. at 175. The Court disapproved of the Ninth Circuit's standard that "if the vessel should realize that the condition presents an unreasonable risk of harm, it is liable if it 'fails to exercise reasonable care under the circumstances' to protect the longshoremen." *Id.* at 174. The Supreme Court characterized this as the "duty to inspect thesis," which it had already rejected. *Id.* It was also unprepared to accept the more modest duty imposed in *Evans v. Transportation Maritime Mexicana*, 639 F.2d 848, 856 (2d Cir. 1981), under which "the shipowner's duty is triggered to take steps, reasonable in the circumstances, to eliminate or neutralize the hazard" that the stevedore will not or cannot correct and that the longshoreman cannot avoid. *Id.* at 175. The *Scindia* Court was prepared only to hold that if it were proven that the ship knew of the malfunctioning cargo winch that was part of the ship's own gear, and which it might have a duty to repair, there was a basis for imposition of the negligence liability.

It is unlikely that the narrow duty of a ship to intervene to make repair was intended to extend beyond defective conditions with respect to the ship, its equipment, and gear. *See, e.g., Hodges v. Evisea Maritime Co., S.A.*, 801 F.2d 678, 683 (4th Cir. 1986) ("jury could conclude that the vessel had a duty to intervene and exercise its control over the No. 3 hold to eliminate the dangerous conditions of the open hatch and poor lighting"), *cert. denied*, 107 S. Ct. 1572 (1987). Since the ship has no duty to inspect the cargo handling operation or the stowed cargo, *Scindia*, 451 U.S. at 178; *see Taylor v. Moram Agencies*, 739 F.2d 1384, 1386-87 (9th Cir. 1984) ("[t]he scope of the shipowner's duty as set forth in *Scindia* focuses on the character of the ship and its equipment - not on the nature of the cargo"), there

would ordinarily be no duty to intervene to remedy dangers created by negligently loaded cargo.[3]

D.

Duty to Warn

Because the ship has no duty to inspect cargo stowage operations, the ship can be held liable for failure to warn of improper stowage, if at all, when the ship has both actual knowledge and the danger was not open and obvious. The district court in *Derr* found undisputed evidence that the danger was apparent to both the vessel and the stevedore, and that there was no warning, that the ship could have given that would have added to the knowledge of a competent stevedore.[4] Indeed, appellant conceded in his brief that even the lack of dunnage and shorage, alleged to be an underlying cause of the accident, "was a condition that could have been discovered by a reasonable inspection of the hold." Appellants' Brief at 46. Consequently, as a matter of law, there was insufficient evidence upon which a jury could find liability. *See Taylor*, 739 F.2d at 1386-87. We find no error in the court's analysis or its conclusion.[5]

The decision of the district court in *Robertson* was based squarely on the lack of evidence upon which a jury could reason-

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3. There was nothing in either case to suggest that the cargo presented an exceptional situation. We leave open the issue of a duty by the ship in such circumstances.

4. The district court in *Derr* did not reach the issue of the vessel's actual knowledge of improper stowage. The only evidence even supporting knowledge was the testimony of the ship's master that "I think there was somebody" assigned to be present to observe the loading of that cargo. App. at 43. This is insufficient, in any event, to show actual knowledge of improper storage.

5. In light of our decision, we need not decide whether the method of stowage was a proximate cause of the injury.

ably have made a finding of actual knowledge, or breach of any duty to know, of the alleged dangerous condition of the cargo. Appellant argues that the evidence of the inspection of the cargo by Cook, an independent cargo surveyor hired by the vessel to check the cargo for insurance purposes, and testimony that the Chief Officer observed the condition of the cargo when the hatch was opened, combined with the fact that the dangerous condition of the cargo "would be immediately apparent to anyone looking in the hold," would have allowed a jury to find actual knowledge. Appellant's Brief at 44-45.

The district court correctly resisted this argument. It recognized, as we have set forth, that to find knowledge of dangerous stowage whenever a person associated with the vessel had reason to examine the cargo would be to reimpose the duty to supervise the stevedore. In any event, appellant's argument proves too much. For if the danger in the cargo was indeed readily apparent "even on a 'cursory' examination," id at 45, then there can be no liability under *Scindia*.

IV.

Summary

We hold today that there is no general duty on the part of a vessel to supervise or inspect the work of stevedores, either during or between cargo operations. A vessel can be deemed negligent towards a longshoreman injured because of improperly stowed cargo only if the vessel has breached one of the limited duties referred to in *Scindia*. Appellants produced no evidence from which a jury could reasonably have concluded that any of those duties was breached. We will therefore affirm the judgment entered by the district courts in *Derr* and *Robertson*.

Supreme Court, U.S.
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90-372

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT GIGANTE,
Petitioner,

v.

RUNSHIP, LTD., and LAURITZEN REEFERS, A/S,
Respondents

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENTAL APPENDIX

Carl D. Buchholz, III,
Counsel of Record
Michael P. Zipfel
RAWLE & HENDERSON
Attorneys for Respondents,
Runship, Ltd., and
Lauritzen Reefers, A/S
211 South Broad Street
Philadelphia, PA 19107
(215) 875-4000

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

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90-372

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT GIGANTE,

Petitioner,

v.

RUNSHIP, LTD., and LAURITZEN REEFERS, A/S,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The Petition accurately states that petitioner, Robert Gigante, a longshoreman, was injured while discharging palletized units of cartons of apples from the No. 2 hold of the MALAYAN REEFER, a cargo ship which was owned by respondent Runship, Ltd., and operated by respondent Lauritzen Reefers, A/S. The Petition also accurately states that respondents had a Port Captain present in Chile where the palletized units of apples were loaded into the vessel by an independent stevedoring contractor. However, contrary to any suggestion contained in the Petition, neither respondent was in any way involved with the loading or discharge of the cargo from the MALAYAN REEFER. Specifically, contrary to the statement at page 5 of the Petition, respondent Lauritzen Reefers, A/S did not determine the size of the "key" to be created by the loading

stevedore, or give any instructions or directions to the loading stevedore with regard to the size of the "key". In fact, the size of the "key" was determined by the discharging stevedore in the United States, petitioner's own employer.

The testimony petitioner relies upon in asserting that respondent Lauritzen Reefers, A/S participated in determining the size of the "key" is the testimony of Claus Pavar, Port Captain for respondent Lauritzen Reefers. Captain Pavar, however, specifically stated during his deposition that it was Holt Cargo Systems, Inc., the discharging stevedore and petitioner's own employer, who determined how large a "key" was needed:

> Q. And how did you arrive at how large a key was needed?
>
> A. Well, according to Holt, the space needed was to get enough room to use the chandeliers.
>
> Q. And that was your understanding, that they only had to have enough space to use the chandeliers?
>
> A. Yes.
>
> Q. Did you decide how large a space that was in terms of feet or number of units?
>
> A. No, that was more or less a number of units, a minimum of ten units would make space for the chandeliers.
>
> Q. You — in your view ten units?
>
> A. Yes, and according to Holt's stevedores.
>
> Q. Who in Holt told you that?
>
> A. Pardon?
>
> Q. Who in Holt told you that ten units would be enough?
>
> A. Well, I talked of course with the stevedoring supervisors and as I mentioned before, Joe Cain and also Michael Donahue.

(See Appendix in Court of Appeals, pages 94A-95A). Further, Captain Pavar testified that it was the decision of the shipper and loading stevedore in Chile, *not* the decision of respondent

Lauritzen Reefers, to place 13 pallets in this particular "key":

> Q. Generally, who determined how many pallets in each deck were preslung on these ships?
>
> A. That was decided by the shippers' organization together with the stevedore.

(See Appendix in Court of Appeals, page 50A). The portion of Captain Pavar's testimony which petitioner relies upon does not support a contrary position. (*See* Appendix in Court of Appeals, pages 122a-124a, reproduced in the Supplemental Appendix at 4b-6b).

Furthermore, respondents also deny that there was any evidence that they had "actual knowledge" that the size of the "key" was unsafe or dangerous. Respondents only admitted that they had "actual knowledge" of *size* of the "key", as did anyone who viewed the cargo upon the completion of stowage or prior to discharge; respondents never admitted and, in fact, have specifically denied, having any knowledge that the size of key was *unsafe* or *dangerous*. There was no evidence submitted by petitioner to support a contrary finding.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Respondents Concur That There Is A Conflict Between The Third And Fifth Circuit Courts of Appeals Regarding A Shipowner's Liability For Improperly Stowed Cargo, However, The Present Case Does Not Properly Present This Conflict For Review Because Even Under The Fifth Circuit's Decision In *Woods v. Sammisa Co., Ltd., et al.*, 873 F.2d 842 (5th Cir. 1989), cert. denied, 110 S.Ct. 853 (1990), Summary Judgment Was Properly Granted In The Present Case.

The Petition accurately states that the District Court granted summary judgment in the present case, and the Court of Appeals affirmed, based upon the holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), cert. denied, 486 U.S. 1007 (1988). The Petition also accurately states that the decision in *Derr* is in conflict with the decision handed down by the Fifth Circuit Court of Appeals in *Woods v. Sammisa Co.*,

Ltd., 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 853 (1990). In fact, in *Woods*, the Fifth Circuit Court of Appeals specifically admitted that its holding was contrary to the Third Circuit's holding in *Derr*. *Woods*, 873 F.2d at 848. Furthermore, the Petition accurately states that the negligence remedy provided under §5(b) of the Longshore and Harbor Workers' Compensation Act, insofar as it relates to a shipowner's responsibility for the condition of cargo stowed by an independent stevedoring contractor, is not being interpreted and/or applied uniformly throughout the country, contrary to the express intent of Congress.[1] The present case, however, does not properly present this conflict for review because even under the Fifth Circuit's decision in *Woods v. Sammisa Co., Ltd., et al.* 873 F.2d 842 (5th Cir. 1989), *cert. denied* 110 S. Ct. 853 (1990), summary judgment was properly granted in the present case.

A. The Third Circuit's Holding In *Derr*, As Well As The Decisions Of The Lower Court And Third Circuit In The Instant Case, Are In Complete Accord With The Legislative History Behind The 1972 Amendments To The Longshore And Harbor Workers' Compensation Act, As Well As This Court's Decision in *Scindia*.

In *Derr*, the Third Circuit Court of Appeals held that a vessel owner has no duty to inspect or supervise the loading of cargo by a stevedore, foreign or domestic, and that a vessel owner has no duty to inspect the cargo prior to turning it over to the discharging stevedore. *Derr*, 835 F.2d at 493-494. Furthermore, the Third Circuit held that even if a vessel has actual knowledge of a dangerous condition involving the cargo, the vessel at most has a duty to warn the stevedore about the condition, and even this duty is negated if the condition is open and obvious. *Id.* at 496. The Petitioner in this case, does not

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1. While the Fifth Circuit Court of Appeals admitted that its holding in *Woods* was contrary to the Third Circuit's prior holding in *Derr*, the Third Circuit admitted that its holding in *Derr* was contrary to the prior holding of the Ninth Circuit in *Turner v. Japan Lines*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982).

argue that the District Court, or the Court of Appeals, misapplied the holding in *Derr* to the facts of this case but, instead, argues that *Derr* is not a correct interpretation of the 1972 Amendments to the Longshore and Harbor Worker's Compensation Act and this Court's decision is *Scindia*. However, Petitioner's argument that a shipowner should be responsible for the work of an independent stevedoring contractor in a foreign port is without merit. In *Derr*, the Third Circuit properly interpreted the legislative history behind the 1972 Amendments and this Court's decision in *Scindia*.

In *Scindia*, this Court clearly and unequivocably held that a shipowner has no duty to inspect or supervise the cargo operations of stevedores, foreign or domestic. This Court said "[t]he shipowner, within limits, is entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations." *Scindia*, 451 U.S. at 172 (1981). Furthermore, this Court held that the shipowner is not liable for the negligence of the independent stevedore. Congress' intent in passing the 1972 Amendments was "to terminate [the vessel's] automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore." *Id.* at 168. Thus, this Court concluded that a vessel owner does not have a duty "to discover and correct dangerous conditions that develop during the *loading* or *unloading process*." *Id.* at 169. This Court recognized that imposing such a duty "would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship." *Id.*

Petitioner's effort to limit the holding in *Scindia* to domestic stevedores, and to make the shipowner liable for the negligence of a foreign loading stevedore, makes absolutely no sense as the lower court pointed out in *Robertson v. Tokai Shosen K.K.*, 655 F.Supp. 152 (E.D. Pa. 1987), the companion case to *Derr*:

> Now, if one may not find the vessel liable for wrongs of the off-loading stevedore under the Act, then one can no more

> find the vessel liable for wrongs of the on-loading stevedore – assuming for the moment that such wrongs are committed.
>
> . . .
>
> If I were to adopt the position ably advocated by plaintiff's counsel, I would eviscerate *Scindia* and the Act. Otherwise, while the vessel would not be required to supervise and inspect each stevedoring operation, *Scindia*, it would be held to such a requirement at each subsequent port which encountered the condition of the stow. This makes no sense, and would render the principle of fault based liability of the vessel a nullity.

Robertson, 655 F.Supp. at 154-155.

The Third Circuit Court of Appeals agreed with the lower court's rationale and concluded that, "the real issue is not where the cargo was loaded, but whether a vessel may be held negligent for failure to inspect or supervise the stowage of cargo." *Derr*, 835 F.2d at 495. The Third Circuit also noted that "the scheme carefully drawn by Congress and interpreted in *Scindia* does not change because the cargo stowage was performed by foreign stevedores." *Id.*

Petitioner also argues that §412 the *Restatement of Torts (Second)*, is the applicable standard which should be applied to the shipowner's responsibility for the negligence of a stevedore. However, §412 of the *Restatement* is not a "basic and well established principle of land side law." Rather, it is an exception to the general rule regarding the liability of employers for the actions of independent contractors. The exception applies only to employers who have a duty to maintain land or chattels, and it has no application in the present case and clearly does not establish the duties of a vessel owner regarding cargo loaded by an independent stevedore. If resort need be had to the *Restatement* for defining the duties of the vessel owner, the applicable section would be §409, not §412. See, e.g., *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977). Under §409, "before liability can attach for such independently created

danger, the owner must have knowledge of its existence and an opportunity to alleviate it." *Id.* at 862.

In fact, in *Scindia*, this Court rejected the principle of §412 of the *Restatement*, which would make the vessel owner liable for supervising the work of the stevedore:

> As a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards. Section 41 of the Act, 33 U.S.C. §941, requires the stevedore, the longshoremen's employer, to provide a "reasonably safe" place to work and to take such safeguards with respect to equipment and working conditions as the Secretary of Labor may determine to be necessary to avoid injury to longshoremen. The ship is not the common employer of the longshoremen and owes no such statutory duty to them.

Scindia, 451 U.S. at 169-170.

B. The Petition For Certiorari Should Be Denied Because The Present Case Does Not Properly Present For Review The Conflict Between The Third And Fifth Circuits Regarding A Shipowner's Liability For Improperly Stowed Cargo Because Even Under *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 853 (1990), Summary Judgment Was Properly Granted In This Case.

In *Woods*, the Fifth Circuit Court of Appeals held that when a vessel owner turns a vessel over to a stevedore, it must "exercise due care to ensure that the vessel's cargo is loaded such that it can be discharged with reasonable safety." *Woods*, 873 F.2d at 850. Accordingly, the Fifth Circuit held that a vessel owner may be liable for injuries resulting from negligently stowed cargo if "a reasonable owner/operator . . . would have perceived the dangers" presented by the condition of the cargo. *Id.* at 852. In other words, the vessel owner may be found liable if it "knew or should have known of the dangerous condition." *Id.* at 850.

In *Woods*, there was evidence from which it could be found that the vessel owner "knew or should have known" of the danger involved. In that case, the plaintiff, a longshoreman, was injured while discharging steel located in the hold of the vessel. "In the forward half of the hold was steel pipe bound for Houston (the 'Houston Pipe'); the aft half contained the pipe which [plaintiff's] crew was directed to discharge (the 'New Orleans pipe')." *Id.* at 845. Prior to the commencement of the discharge operation,

> the longshoreman looked into the hold . . . [and] noticed that, to varying degrees, the aft ends of some of the Houston pipe overlapped the forward ends of the New Orleans pipe. . . .
>
> The longshoremen agreed among themselves that it was a "bad stow," and the crew's superintendent told members of the ship's crew that the discharge would have to proceed very slowly because of the cargo's condition.

Id. As a result of the improper stowage of the pipe, the plaintiff was injured during the discharge operation.

In the present case, there is no evidence from which it could be determined that the vessel owner "knew or should have known" of the alleged danger involved. As previously noted, respondent Lauritzen Reefers, A/S only had knowledge of the size of the "key;" there is absolutely no evidence from which it could be inferred that respondents "knew or should have known" of the *danger* involved. In fact, the evidence showed that thirteen (13) prior vessels operated by respondent Lauritzen Reefers, A/S had come into the Port of Philadelphia in the 1984-85 fruit season with the same or approximately the same size "keys", and the discharge operations proceeded on those vessels without incident. (*See* Appendix in Court of Appeals at pages 46A, 73A-74A, reproduced in the Supplemental Appendix at 1b, 3b-4b). Furthermore, on the day of the incident in question, the petitioner and the other longshoremen were obviously aware of the size of the "key," yet no complaints were made to the vessel about its size. (*See* Appendix in Court

of Appeals at pages 71A-72A, reproduced in the Supplemental Appendix at 1b-2b.) Therefore, contrary to the situation in *Woods*, there is no evidence that the vessel owner knew or should have known that the cargo was stowed in an improper or dangerous manner. Thus, even under *Woods*, summary judgment would have been granted in this case.

Furthermore, as previously noted, the evidence presented established that the size of the "key" was not determined by the respondents but, instead, was determined by the discharging stevedore, petitioner's own employer. Thus, the petitioner cannot assert that the respondents should have known that the size of the "key" was improper or posed a danger to the longshoreman since his own employer, an expert in stevedoring operations, determined that the size of the "key" was sufficient.

Finally, in this case, petitioner is not seeking to impose liability upon the respondents for the negligence of the loading stevedore as was the case in *Woods*. Instead, petitioner is seeking to impose liability upon the vessel defendants for the negligence of his own employer, the discharging stevedore. Contrary to the case in *Woods*, the cargo in this case was not stowed improperly by the foreign loading stevedore; it was stowed exactly as Holt, the domestic discharging stevedore, said it should be stowed. Therefore, the alleged negligence at issue is the negligence of the discharging stevedore in determining the size of the key. Accordingly, the present case does not properly present for review the conflict between the Third and Fifth Circuits regarding a shipowner's liability for improperly stowed cargo because even under the Fifth Circuit's decision in *Woods*, summary judgment was properly granted in this case.

CONCLUSION

Although respondents concur with Petitioner that there is a conflict between the Third and Fifth Circuits regarding a shipowner's liability for improperly stowed cargo, the present case does not properly present this conflict for review because even under the Fifth Circuit's decision in *Woods v. Sammisa Co., Ltd., et al.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 853 (1990), summary judgment was properly granted in this case.

Respectfully submitted,

RAWLE & HENDERSON

By: _____

Carl D. Buchholz, III
Michael P. Zipfel
Attorneys for Respondents,
Runship, Ltd. and
Lauritzen Reefers, A/S
211 South Broad Street
Philadelphia, PA 19107
(215) 875-4000

SUPPLEMENTAL APPENDIX

Excerpt from Court of Appeals Appendix — 46A

Claus Pavar — Direct/Buchholz

A. Philadelphia.

Q. What were your duties as port captain assigned to Philadelphia during — at that time?

A. I was coordinating the arrival and discharge and the delivery of the fruit.

Q. Of fruit vessels?

A. Yeah, fruit vessels.

Q. How many fruit vessels did Lauritzen bring to Philadelphia during the 1985 fruit season?

A. There was a total of fourteen vessels in '85 season.

Q. That would be from January until about June?

A. Yeah, generally through May.

Q. Through May?

A. Yeah.

Q. January through May.

And of the fourteen, does that include a vessel called the Malayan Reefer?

A. That's correct.

Q. These fourteen vessels, were they all refrigerated vessels?

A. Yes.

Q. And we call them reefer ships; is that right?

A. That's right.

Q. Did you remain in Philadelphia for the 1985

Excerpt from Court of Appeals Appendix — 71A

Claus Pavar — Direct/Buchholz

MR. BUCHHOLZ: Right, thirteen pallets in that entire area.

THE WITNESS: That's right, thirteen in the area.

BY MR. BUCHHOLZ:

Q. And you say that would have created an area — a space about a hundred and seventy square feet?

A. Yeah, for – where the thirteen pallets was, yes.

Q. Could you tell if the longshoremen had begun to take out any of the remaining pallets, the ones that had not been preslung, before the accident?

A. Yes, they did start to take out the remaining –

Q. Could you tell how many?

A. Two.

Q. They'd taken out two?

A. Yes.

Q. Had you received any complaints from the longshoremen or the stevedores about the size of the key in the C deck of the number two hatch prior to the accident?

A. No, I had not.

Q. Had you received any complaints from the longshoremen or the stevedores that there was not sufficient room in the key of the C deck for the

Excerpt from Court of Appeals Appendix – 72A

Claus Pavar – Direct/Buchholz

longshoremen to safely work prior to the accident?

A. Nobody.

THE VIDEOTAPE OPERATOR: Sir, keep you voice up.

THE WITNESS: Sorry, yes.

BY MR. BUCHHOLZ:

Q. What was the average number of preslung pallets in the decks of the fruit ships during the '85 fruit season?

MR. SOVEL: Objection.

THE WITNESS: They were between ten and eighteen pallets, preslung pallets, in the decks.

BY MR. BUCHHOLZ:

Q. Do you – does the stowage plan that we – do you have a stowage plan which would show the number of preslung pallets in the various decks?

A. Yeah – on this particular vessel?

Q. Yes, on the Malayan Reefer.

A. Yes.

Q. Let me mark this Pavar-9.

Can you tell us what – this is a cross-section of the ship; is that right?

A. Yes, that's correct.

Q. Where's the forward end?

Excerpt from Court of Appeals Appendix – 73A

Claus Pavar – Direct/Buchholz

A. Forward end is up here. This is hatch number one, with three decks. This is hatch number two, this is hatch number three and this is hatch number four, the after end of the vessel.

And on each deck the preslung pallets has been marked. For instance in number 1A deck, the thirteen preslung pallets; B deck, fourteen preslung; and in 1C deck, fourteen.

In Hold Number two, 2A deck was empty, and there was empty space in the square of 2B deck. There was no preslung pallets here, and in 2C deck there were thirteen preslung pallets and in 2D deck, sixteen preslung pallets.

And in number 3A, ten; 3B, thirteen; 3C, twelve; and 3D twelve with slings.

And hatch number four, A deck, fourteen; B deck was empty space in the square, no preslung; and in C deck, eleven pallets with slings.

Q. So it varied from -- what was the least number of preslungs?

A. It varied from ten to sixteen in this vessel here.

Q. And how many were in the C deck where this accident took place?

A. Thirteen.

Q. During the 1985 fruit season, had there been

Excerpt from Court of Appeals Appendix – 74A

Claus Pavar – Direct/Buchholz

any complaints made to you by the stevedore about the size of the keys in any of the fourteen fruit ships?

A. No.

MR. SOVEL: Objection.

Q. Had you been aware of any problem with the size of the keys on any of the fourteen fruit ships?

A. No, we hadn't any problems.

Q. When you got to the number two hatch after you learned of this accident, describe what you saw?

A. When I came down on the deck and went to hatch number two, I looked down in the hatch.

I saw the cartons of apples scattered all over the deck from the middle of the deck and forward part of it mainly.

Q. Is that what's shown in –

A. Yeah, that's –

Q. – photograph Pavar-8?

A. Yeah, that's a photograph I took at that time.

Q. What else did you observe?

A. Yeah, I observed that – that the pallets they were about to discharge were hanging on the hook over the deck, and –

Q. When you say the hook do you mean the chandelier?

A. Well, the chandelier is hooked through a hook –

Excerpt from Court of Appeals Appendix – 121A

Claus Pavar – Recross/Sovel

BY MR. SOVEL:

Q. Captain, in determining the rate –

MR. BUCHHOLZ: Objection. This is beyond the scope of redirect.

MR. SOVEL: Stop – you haven't even heard the question, Mr. Buchholz.

BY MR. SOVEL:

Q. In determining the rate that Lauritzen was paying Holt for discharging these cargos, was not the

Excerpt from Court of Appeals Appendix – 122A

Claus Pavar – Recross/Sovel

fact that they were going to use these spreaders, chandelier

spreaders, and the speed at which they could discharge the cargo using those spreaders, a factor that was considered?

MR. BUCHHOLZ: Objection.

THE WITNESS: I cannot tell, but I can only tell that Holt are using the chandeliers, and they want to use the chandeliers, and that's their operation.

BY MR. SOVEL:

Q. But they quote you a rate per unit, do they not, or a rate per ton of cargo?

A. I was not involved in the – this negotiation with the stevedoring contract there, so I cannot tell you exactly.

Q. But you know that they're paid a certain amount per ton of cargo they discharge?

A. Yes.

Q. And you know from your own experience that the rate that they can charge you depends upon how quickly they can discharge the cargo?

A. That's right.

Q. And therefore, they wanted to use the spreaders–

MR. BUCHHOLZ: Objection.

BY MR. SOVEL:

Excerpt from Court of Appeals Appendix – 123A

Claus Pavar – Recross/Sovel

Q. You understood that?

A. I understand you.

Q. And you were to have the ships to come in in such a manner that they could use them?

MR. BUCHHOLZ: Objection to the question.

THE WITNESS: I do understand your question.

MR. SOVEL: You do or do not?

THE WITNESS: Yes, I understand your –

BY MR. SOVEL:

Q. Is that not correct?

A. That is correct, because Holt are using chandeliers for operation.

There's no doubt about that.

Q. And the ships are to come in in such a manner that they could use the chandelier spreaders and use forklift trucks?

A. They come in preslung in the squares so after the preslung is out there'll be space for the chandeliers.

Q. And for the forklifts?

A. Oh, no, not for the forklifts?

Q. Not for the forklifts.

Excerpt from Court of Appeals Appendix – 124A

Claus Pavar – Recross/Sovel

A. Not for forklifts. For the chandeliers.

Q. Not – you say not for the forklifts?

A. Yes.

Q. So space for the chandeliers –

A. Yes.

Q. – with the idea that the chandeliers will be able to clear the space for the forklifts?

A. Yes.

MR. SOVEL: Thank you.

No further questions.

MR. BUCHHOLZ: No further questions.

THE VIDEOTAPE OPERATOR: This concludes the deposition.

The time is 11:37

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Supreme Court, U.S.
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CLERK

(4)

No. 90 - 372

IN THE
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October Term, 1990

ROBERT GIGANTE,

Petitioner,

v.

RUNSHIP, LTD., and
LAURITZEN REEFERS, A/S,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY TO BRIEF IN OPPOSITION AND SUPPLEMENTAL APPENDIX

Charles Sovel, Esq.
Freedman and Lorry, P.C.
800 Lafayette Building
5th and Chestnut Streets
Philadelphia, PA 19106
(215) 925-8400
Attorneys for Petitioner

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REPLY TO BRIEF IN OPPOSITION

Although conceding that the decision below is in conflict with the decision of the Fifth Circuit in *Woods v. Sammisa Co., Ltd., et al*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 107 L.Ed.2d 847 (1990), as well as with the decision of the Ninth Circuit in *Turner v. Japan Lines*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), respondents nonetheless assert that a Writ of Certiorari should be denied because "even under the Fifth Circuit's decision in *Woods*" summary judgment was properly granted in the present case. This argument is without merit

for several reasons. First, it is based on a misstatement of Petitioner's theory of liability. Secondly, it is based on a patently erroneous interpretation of the *Woods* decision. Third, it ignores the fact that the decisions below in the instant case, both in the District Court and in the Third Circuit, were based exclusively on the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), the decision which respondents admit is in conflict with the Fifth Circuit's decision in *Woods*. Finally, respondents devote a considerable portion of their Brief in Opposition to arguing that the decision in *Derr* is correct and that *Woods* is wrong, an argument which simply emphasizes the existence of the conflict in Circuits and which in no way supports the contention that "even under the decision in *Woods*" summary judgment was properly granted in the instant case.

I.

Initially, respondents assert that petitioner erroneously states in the Petition that respondent determined the size of the "key". This is not correct. Rather, at page 5 of the Petition, it is stated that there was evidence that respondent Lauritzen Reefers, A/S "instructed" the foreign stevedore with respect to the size of the keys to be created, meaning that respondent, Lauritzen Reefers A/S, "transmitted" this information to the loading stevedore. There is ample evidence in the record to support this statement.[1] The facts, as

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1. It is important to bear in mind that the case below was decided on motion for summary judgment. It is fundamental that in resolving such a motion all the facts and the inferences reasonably to be drawn therefrom are to be interpreted in the light most favorable to the party opposing the motion, *i.e.*, -- petitioner. Respondents ignore this principle with many of the arguments in the Brief in Opposition actually being factual arguments which either are contradicted by other evidence in the record or are based on inferences which are subject to a different interpretation by the fact finder. To the extent that respondents are arguing that summary judgment was properly entered "even under the *Wood*'s decision," they are making a factual argument where the inferences to be drawn

set forth in the testimony of respondents' representative, a Captain Claus Pavar, were as follows.

Lauritzen Reefers A/S was the representative of fourteen vessels that were bringing fruit to the port of Philadelphia during the 1985 season (1b).[2] Holt Cargo Systems, petitioners' stevedore employer, was hired by Lauritzen Reefers A/S to discharge the fruit from these fourteen vessels (1c). In conjunction with the negotiating of this contract, it was understood that Holt Cargo Systems would be using the chandelier spreaders as the method of discharge (2c)[3] and that this required that a "key" be created in the

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from the facts are in dispute and, therefore, would not support the granting of summary judgment.

2. Page references followed by the letter "a" are to the Appendix filed with the Petition. Page references followed by the letter "b" are to the Supplemental Appendix filed with the Brief in Opposition. Page references followed by the letter "c" are to the Supplemental Appendix filed with this Reply Brief.

3. The method of discharging the cargo, *i.e.*, -- the use of chandelier spreaders, was a factor in determining the speed and ease with which the cargo could be discharged and, therefore, was a factor in determining the unit or tonnage rate to be paid the discharging stevedore (Holt) by respondent Lauritzen Reefers, A/S for discharging the fruit cargo (5b-6b).

The fact that plaintiff's employer, Holt, may not have recognized the danger created by the small size of the keys does not excuse the vessel from liability. As the was noted in *Moore v. M.P. Howlett*, 704 F.2d 39, 43 (2nd Cir. 1983):

> We disagree with the district judge's evaluation of the evidence. His determination was premised on his finding that since neither plaintiff nor the stevedore anticipated harm from the obvious hazard, it was unreasonable to hold the shipowner liable for failing to anticipate that harm. *The fact that neither plaintiff nor the stevedore took any precautions in the face of this hazard does not relieve defendant of responsibility, for it is funda-*

stow at each deck level by the loading stevedore. As a result of the discussions between Holt Cargo Systems (the discharging stevedore) and respondent, Lauritzen Reefers A/S, it was understood that the size of the key to be created would be large enough to permit the use of the chandelier spreaders, but not larger than that (6b). This information was then transmitted to the loading stevedore in Chile who actually made the determination of the size of each individual key in the course of its performing of the loading operation. However, as set forth in the Petition, and not denied by respondents, the size of the key was made known to the vessel in the person of its port captain who was present in the loading port, through the providing of a stowage plan which showed the location and size of the key, through the acceptance by the captain of the vessel who certified that the stowage was performed to his entire satisfaction, and by the observation of Captain Pavar as the port captain in the discharging port, who admitted that he also was aware of the size of the keys that were being created.

Petitioners' theory of liability, and the basis of the conflict between the decision below and the views of the Fifth Circuit as set forth in *Woods v. Sammisa Co., Ltd., et al, supra, Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir., 1984), and *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir., 1981), does not rest on the contention that the vessel "created" the unsafe condition in the cargo stow, but, rather, that the vessel had "knowledge" of the unsafe condition that was being created in the cargo stow and failed to take action to remedy it, *cf. Woods, supra*, 873 F.2d at 851 (39a). In the instant case, there is ample evidence to support a finding of such knowledge, and, therefore, create a clear and unequivocal conflict

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> *mental that there may be more than one proximate cause of an injury. Thus, the jury could have found that the stevedore, shipowner, and plaintiff all unreasonably believed that the longshoreman could perform his duties on the barge without injury.* (Emphasis supplied)

between the views of the Third Circuit and the views of the Fifth Circuit.

II.

Respondents next argue, citing *Woods* as authority, that the Writ should be denied because in the instant case there was no evidence that the vessel "knew or should have known" that the condition of the stow created a hazardous condition whereas, in *Woods*, there was evidence that the owner knew or should have known of the danger involved (see Brief in Opposition at page 8). In short, while respondents admit knowledge of the facts of the condition, *i.e.*, the size of the keys, they deny that they knew that this created an unsafe condition. Were this unique theory of defense to be recognized, a shipowner could be held liable only if it *admitted* that a condition was unsafe, thereby completely negating the concept of the duty to exercise reasonable care under the circumstances. Contrary to the assertions in the Brief in Opposition, a similar argument also was made on behalf of the shipowner in *Woods v. Sammisa Co., Ltd., et al, supra*, and was unequivocally rejected by the Fifth Circuit as follows 873 F.2d at 851 (38A-40A):

> The defendants offer two arguments against this conclusion. Firstly, they assert that, although there was evidence that the overlapping condition of the cargo meant that the discharge would have to proceed "slowly," there was no evidence that the condition of the cargo presented an unreasonable risk of harm to the longshoremen. *Secondly, they contend that there was no evidence that the defendants, through their employees, had any knowledge that the stow presented an unreasonable risk of harm.*
>
> . . .
>
> The defendants' second argument is similarly without merit. *They do not and cannot deny that they were*

aware of the overlapping condition of the cargo; the record establishes beyond doubt that the owner/operator knew in Brazil that the cargo was being stowed in an overlapping fashion and that the overlap continued to exist when discharge operations began in New Orleans. *Cf. Lemon*, 656 F.2d at 116. *Their contention is only that they did not have actual knowledge of the danger which this condition presented such that liability may attach under Scindia.*

But the defendants misread *Scindia*. Under the first *Scindia* duty, there is no requirement that the vessel have actual knowledge of the danger presented before liability will attach. Rather, that duty speaks only in terms of a failure to exercise due care (although we measure its duty with regard to, not the ordinary stevedore, but an "expert and experienced" stevedore exercising "reasonable care"). The law of negligence has never required that a tortfeasor actually be aware of the risks which its actions create before it may be held liable, and *Scindia* does not add such a requirement in this context. *See Harris*, 730 F.2d at 299 (defendants may be liable under the first duty "[in] situations where the [defendants] knew or should have known of the dangerous condition") (emphasis added). *All that is required is that the injury that results from the failure to exercise due care be reasonably foreseeable--and in this case a reasonable owner/operator and time charterer would have perceived the dangers presented by the overlapping condition of the cargo.* (Emphasis supplied)

III.

In arguing that summary judgment would be proper in the instant case even under the *Woods* decision, respondents are simply ignoring what was stated by the District Court and the Third Circuit in the decisions below. The District Court clearly based its decision exclusively on the decision in *Derr, supra*, even going so far as to specifically state that

it was following this Court's decision in *Scindia* "only to the extent to which it has been adopted by the Third Circuit in Derr" (10a).

The importance of *Derr* as the basis for the decisions below was then emphasized by the Third Circuit which cited it as its *sole* reason for affirming the decision of the District Court (25a), following which Judge Becker, who was a member of the panel which originally decided the appeal, stated on the motion for rehearing that he would grant rehearing so that the court *in banc* might reconsider *Derr* (17a).

In view of this history, the argument that summary judgment would have been granted under the decision in *Woods* without the *Derr* decision is patently without merit.

IV.

Finally, respondents argue that this Court should deny a Writ of Certiorari because the views of the Third Circuit, as expressed in *Derr* are in accord with this Court's decision in *Scindia* (Brief in Opposition at pages 4-7). However, as set forth in the Petition, the views of the Third Circuit in *Derr* are based on an interpretation of *Scindia* which equates the position of the foreign loading stevedore, who is not the plaintiff's employer, with that of the discharging stevedore who has no ability to control the manner in which the loading stevedore performed its work. For the reasons set forth in the Petition, this equating of the foreign stevedore with the limited duties placed on the plaintiff's employer goes to the heart of the conflict which currently exists in the decisions of the Circuit Courts, a conflict which, it is submitted, urgently requires resolution by this Court.

CONCLUSION

The existence of a conflict in Circuits and the substantiality of the question presented have not and can not be denied. Respondents' assertion that summary judgment properly would have been granted even under the Fifth Circuit's decision in *Woods v. Sammisa Co., Ltd., et al, supra*, is not supported by the record, and, indeed, is refuted by the decision of both the District Court and the Court of Appeals below.

The record in this case raises in a clear and precise manner the issue of a shipowner's responsibility for the manner in which cargo is stowed by a foreign stevedore. In view of the number of cases that have been and will be affected by the decision in *Derr*, it is important that this aspect of the shipowner's duty of care be clarified. Accordingly, it is submitted that a Writ of Certiorari should issue to review the judgment below.

Respectfully submitted,

Charles Sovel
Freedman and Lorry, P.C.
800 Lafayette Building
5th and Chestnut Sts.
Philadelphia, PA 19106
(215) 925 - 8400
Attorneys for Petitioner

SUPPLEMENTAL APPENDIX

Excerpt from Court of Appeals Appendix - 84A

CROSS-EXAMINATION

BY MR. SOVEL:

Q. Captain Pavar, Holt Cargo Systems was hired to discharge this cargo by Lauritzen Reefers, was it not?

A. That's correct.

Q. Who from Lauritzen Reefers negotiated the agreement with Holt Cargo Systems for the stevedoring services on the various fruit vessels?

A. The agreement was negotiated -- negotiated with -- by the fleet manager, Jorgen Paulsen, and Holt.

Q. Did you participate in that?

A. No, not for -- for this-- for this freight here, no.

Q. How did you learn about the agreement?

A. From Jorgen Paulsen.

Q. Do you have a copy of the agreement?

A. I have not.

Q. You don't? You never were provided a copy of the agreement with Holt System?

Excerpt from Court of Appeals Appendix - 85A

A. No, no.

Q. In connection with the agreement with Holt, did you understand that they were going to be using these chandelier spreaders in the discharging of the cargo?

A. Yes.

Q. Was the use of forklift trucks in the hold also understood at the time the contract was negotiated?

A. Yes.

Q. What I'm getting at, Captain, the -- in negotiating the contract, it was understood that Holt would be using the chandelier spreaders to take out the cargo and using forklift trucks in the hold to bring those units that were in the wings of the hold into the center where they could be affixed to the chandelier spreader?

A. Yes.

Q. You knew that that was the method of discharge?

A. Oh, yes.

Q. In doing this, was there any discussion with Holt as to the size of the key that would be provided for them to begin their operation?

A. Of course there must have been a discussion of that, because they'll need a certain area to get in the chandeliers.